TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 577

BOB GRANVILLE POINTER, PETITIONER

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED MARCH 23, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

Supreme Court of the United States

OCTOBER TERM, 1964

No. 577

BOB GRANVILLE POINTER, PETITIONER

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TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

INDEX

[fol. A]

IN THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

INDICTMENT—filed July 16, 1962

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jury of Harris County, State of Texas, duly organized at the MAY Term, A.D. 1962 of Criminal Court No. 5 of said county, in said Court, at said term, do present that BOB GRANVILLE POINTER on or about the 16th day of June, A.D. 1962, in said County and State, did in and upon Kenneth W. Phillips make an assault, and did then and there by said assault and by violence and by putting the said Kenneth W. Phillips in fear of life and bodily injury, fraudulently and against the will of the said Kenneth W. Phillips take from the person and possession of the said Kenneth W. Phillips, three hundred seventy five dollars in money of the value of three hundred seventy five dollars, the same being then and there the corporeal personal property of the said Kenneth W. Phillips with the intent then and there to deprive the said Kenneth W. Phillips of the value of the same and to appropriate it to the use of him, the said BOB GRANVILLE POINTER.

Against the peace and dignity of the State.

/s/ E. Jack Walton
Foreman of the Grand Jury

[fol. B] THE STATE OF TEXAS,
County of Harris

I, R. J. LINDLEY, Clerk of the Criminal District Court of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original indictment presented by the Grand Jury, and now on file in said Court.

Given under my hand and seal of said Court at office in Houston, this day of , 19 .

R. J. LINDLEY
Clerk Criminal District Court,
Harris County, Texas
By , Deputy

Transferred To CD4
8-14-62 Passed
No. 101374 CD 3
9-17-62 Passed
52/247

THE STATE OF TEXAS

vs.

BOB GRANVILLE POINTER

INDICTMENT

ROBBERY BY ASSAULT

Bail, $2,500.00

/s/ Sam W. Davis
Judge

Filed JUL 16, 1962

R. J. LINDLEY
Clerk District Court
Criminal District Court,
Harris County, Texas

By Glenn E. Musselman
Deputy

Witnesses: Kenneth W. Phillips, 8410 Blankenship

Examining Trial Testimony filed by District Attorney

RAGAN 190312 6-25-62 aw

[fol. C]

IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

No. 102,982

NOVEMBER TERM, A. D., 1962

THE STATE OF TEXAS

vs.

BOB GRANVILLE POINTER

DEFENDANT'S MOTION FOR CONTINUANCE AND MOTION TO THE COURT TO BE DISMISSED AS COUNSEL FOR DEFENDANT

BE IT REMEMBERED that upon this the 6th day of November, A. D., 1963, came on to be heard the Motions above-mentioned in the above-entitled and numbered cause, before the HON. E. B. DUGGAN, JUDGE PRESIDING, and all parties having appeared in person and by their respective counsel, the following evidence was adduced, to-wit:

APPEARANCES

FOR THE STATE OF TEXAS:

Mr. Daniel P. Ryan, Jr.
Mr. Frank Puckett, Jr.
Assistant District Attorneys
Harris County, Texas

FOR THE DEFENDANT POINTER:

Mr. C. C. Divine
Mr. Charles W. Gill
Attorneys-at-Law
Houston, Texas

[fol. D]

* * * *

BOB GRANVILLE POINTER,

THE DEFENDANT, taking the witness stand in his own behalf, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

For the Defendant

By Mr. Divine:

Q Your name is Bob Granville Pointer?

[fol. E] A Yes, sir.

Q How long have you been under arrest in this case, Bob?

A Approximately five months.

Q Have you been in the County Jail all that time?

A Yes, sir.

Q Now, have you consulted any attorneys at all in regards to representing you?

A No, sir, I haven't. I haven't talked to any.

Q Do you recall the last time that you appeared in this Court for the setting of this case, for trial, I mean?

A Yes, sir, I do.

Q Did you have an attorney at that time?

A I thought I had Mr. Hoover representing me, but he withdrew from the case.

Q Had you paid or had any of your people paid Mr. Hoover any money?

A Yes, sir, I paid him. I paid him some checks that were made out to me.

Q What was that? I didn't hear it.

A I give him cashier's checks that were made out to me. I just signed them and give them to him.

Q Do you know how much that amounted to, approximately?

[fol. F] A Well, I personally gave him six hundred dollars.

Q On this case?

A No, sir, no. I wouldn't say that it was all on this case.

Q Not all of it was on this case?

A No, sir, I just had him as a lawyer at that time.

Q That was on all the cases that you have had?

A Yes, sir, on one of them, anyhow.

Q Now, when was the first time you ever saw me? That is, to talk to me about this case?

A The first time I ever talked to you was just this morning.

Q And you have not paid me anything, have you?

A No, sir, I haven't.

Q Have I discussed the facts of this case with you?

A No, sir.

Q Were you informed by this Court on your last appearance here that you would have an appointed counsel?

A No, sir, he was just appointed. I knew that one had been appointed, though. Mr. Gill come up to see me.

Q All right, has Mr. Gill been to see you from that [fol. G] time until the present day?

A He has been up there to see me and tell me that he was appointed, but that's as far as the discussion went.

Q Have you told him or talked to him or discussed with him anything about the facts of this case?

A No, sir.

Q Since learning that he had been appointed, have you made any efforts to relieve him of his appointment?

A Yes, sir, I have.

Q What have you done?

A Well, I have notified him by letter that my people just this last Sunday told me that they had made arrangements for me to be represented, and didn't . . .

* * * *

[fol. H] INTERROGATION BY THE COURT

Q (By Judge Duggan) All right, now, Mr. Pointer, the case was set for trial on August the 14th, 1962, was it not?

A I guess so.

Q And it was passed on your behalf because you didn't have a lawyer on that occasion, wasn't it?

A The last occasion I was in here, I . . .

Q All right, on August the 14th, 1962, this case Number 101,374, the State of Texas versus Bob Granville Pointer, was passed on your behalf because you didn't have an attorney at that time, wasn't it?

A Yes, sir, I asked you to pass it.

Q All right, then, on September the 17th, 1962, you didn't have an attorney then, did you?

A I don't remember that date, Your Honor, September 17th.

Q Well, the last time this case was set, which was on September the 17th, 1962, and didn't I tell you then— [fol. I] you said your mother was trying to hire someone, and didn't I tell you then that that was the second time this case had been passed so you could get an attorney, and that you would have to have an attorney, that it was going to be set again, and I gave you over a month to get an attorney, and, at that time, I appointed Charles W. Gill to represent you?

A Well, I have just been in your Courtroom once, Your Honor, to . . .

Q Well, you appeared—we are going to get to that later—you appeared in Judge Krichamer's Court on August the 14th, 1962, and it was passed then because you did not have an attorney, right?

A I believe Mr. Hoover had that passed. I didn't talk to no one.

Q All right, then, on September the 17th, 1962, you appeared in this Court and you said that you didn't have an attorney, and you said that your mother was going to get you one, and I said we will give you over a month to get one, but I said the case was going to have to go to trial, and I appointed Mr. Gill at that time to represent [fol. J] you, in case you didn't have an attorney, isn't that correct?

A Well, I don't know the exact date when Mr. Gill was appointed.

Q Don't you know that he was appointed on September the 17th, 1962, the day you were here in this Court, and I told you then, "I am appointing Mr. Charles W. Gill to represent you", and that we were going to have to

try the case, and I will give you over a month—actually, it had been seven weeks—and for you to get an attorney during that period of time—get another one.

A Well, I requested permission to have time to get an attorney, but you never appointed Mr. Gill in my presence, Your Honor. You did inform me that he was appointed, though.

Q Now, I think in the prior case in this Court that you were represented by Mr. Cutler, Mr. John Cutler, were you not?

A He did represent me in the case.

Q In that case?

A Yes, sir, but it was against my will.

Q Your mother didn't employ him?

A No, sir. I had discharged Mr. Cutler before we went to trial, but it turned out that he went ahead and [fol. K] represented me, or defended me.

Q Well, who was your lawyer, then, in that case?

A Well, I made arrangements for Mr. Clyde Gordon to represent me, but he was out of town.

Q And you have been in jail, you say, and you haven't called or written to anyone—written to the Clerk's Office—or to the Court or to the Clerk of the Court, requesting any subpoenaes be issued, have you?

A No, sir.

Q And your mother, you say, did contact Mr. Divine?

A She told me that they had arranged for Mr. Divine to represent me; that was this past Sunday. That was my understanding, Your Honor.

THE COURT: All right, do you have any questions, Mr. Ryan?

MR. RYAN: Yes, sir, Your Honor.

CROSS EXAMINATION

For the State

By Mr. Ryan:

Q Pointer, how long have you been in jail this last time?

[fol. L] A Five months, approximately.

Q And during that period of time, this is the third time that your case has been set for trial, isn't that correct?

A I believe so.

Q And on the two prior occasions, August 14th, 1962, and on September 17th, 1962, on both of those occasions, the case was passed at your request, or at your attorney's request, is that correct?

A Yes, I think it was, but I don't remember the dates very well.

Q Now, Mr. Gill was appointed to represent you on September the 17th, 1962, is that correct?

A I don't have no record of it. I don't remember exactly when it was.

Q Do you recall when he came to see you up there in jail and told you that he had been appointed to represent you?

A I recall that he did come to see me. I don't remember the date, though.

Q You don't remember the date?

A No, sir.

Q Was it more than a month ago?

A It seems like it has been a month, yes.

[fol. M] Q So it has been over a month ago that he came up and talked to you in jail and told you that he was the lawyer that had been appointed by the Court to represent you in this case, isn't that right?

A I believe it is. I believe it has been a month ago.

Q All right, you believe it has been a month?

A Yes, sir.

Q And isn't it a fact that when he came up there to talk to you about this case that you just didn't want to talk to him about it?

A I told him—no, sir. I told him my people were trying to get me a lawyer, then. That's exactly what I told Mr. Gill, that I would let him know. Right then, my people were telling me every week—they were telling me that they were going out to get some money together to get me a lawyer.

Q But Mr. Gill did tell you that he had been appointed by the Court to represent you in this case?

A Yes, sir, he did tell me that he had been appointed by the Court.

Q And you did refuse to talk to him about your case? [fol. N] That was your choice, wasn't it?

A Well, I told him I didn't want to talk to him.

Q You told him that you didn't want to talk to him, even after he told you that he was your lawyer and had been appointed by the Court, isn't that right?

A I told him that I didn't want to talk to him at that time, that I would let him know if I . . .

Q And that has been over a month ago, isn't that right?

A Mr. Gill has been up to see me twice, and I told him the same thing both times.

Q And that was over a month ago?

A Yes, and I just didn't know whether my folks had got me a lawyer or not.

Q And that was over a month ago?

A I don't know if it was over a month ago or not.

Q Well, just a while ago you said you did. Are you changing it now?

A I said I believed it was.

Q And you know that this case that has been set here today, on November 6th, 1962, being set for trial in this Court, and you know that it has been set for trial since October 23rd, 1962, do you not?

[fol. O] A I don't know that it has.

Q Well, you knew that your case was coming up for trial, and you have known it for several weeks, haven't you?

A Yes, I knew that it was coming up for trial today.

Q And how long have you known that it was coming up for trial today?

A Since I have received a copy of the Court Docket and it has been approximately two weeks.

Q That has been two weeks ago?

A Yes, sir.

Q And during that time, had you gotten any other lawyer or anybody?

A I have been trying to.

Q And you have known it was set for trial today, here in Court?

A Yes, I knew it was set for trial.

MR. RYAN: That's all I have, Your Honor.

* * * *

[fol. P] THE COURT: This Defendant's rights have been respected, Mr. Divine.

[fol. Q] The case was set first for August the 14th, 1962, passed at his instance, then, to get an attorney.

It was again set for September 17th, 1962, again passed at his instance, at which time I told him that I would appoint him a lawyer, and that if he got a lawyer, or if his family wanted to hire a lawyer for him, that he would have over a month to do so.

MOTION OVERRULED

Actually, he has had seven weeks since I told him that, on September 17th, so your motion is overruled.

MR. DIVINE: Note our exception, Your Honor.

THE COURT: Yes, sir, and you have the right to subpoena anyone you wish now, Counsel.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 1-A.

MR. DIVINE: Is my motion to be excused also overruled, Your Honor?

THE COURT: Yes, sir.

MR. DIVINE: Note our exception to the Court's ruling in that regard.

[fol. R] THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 1-B

MR. DIVINE: May we have just a few minutes, Your Honor, to issue instanter subpoenaes?

THE COURT: Yes, sir, you may.

MR. DIVINE: Let the record reflect at this time, Your Honor, that both Charles W. Gill and C. C. Divine are counsel for the Defendant.

THE COURT: Mr. Gill is counsel by appointment, as he has been since September 17th, 1962, and you are counsel of his own choosing, Mr. Divine.

MR. DIVINE: Note our exception to the Court's ruling.

THE COURT: Yes, sir.

THE ABOVE IS THE SAME AS DEFENDANT'S BILL OF EXCEPTION NO. 1-B.

* * * *

[fol. S] [Reporter's Certificate to foregoing transcript omitted in printing]

[fol. T] [ATTORNEY'S AGGREEMENT omitted in printing]

[fol. 1] IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

NOVEMBER TERM, 1962

No. 101,374

THE STATE OF TEXAS

vs.

BOB GRANVILLE POINTER

STATEMENT OF FACTS—NOVEMBER 6, 1962

BE IT REMEMBERED, that upon this the 6th day of November, A. D., 1962, the above-numbered and styled Cause came on for trial before the HON. E. B. DUGGAN, JUDGE OF SAID COURT, and all parties having appeared in person, and by their respective Counsel, and having announced ready for trial, the following testimony was adduced, and facts proven, to-wit:

APPEARANCES

FOR THE STATE: Mr. Daniel P. Ryan, Jr.
Mr. Frank Puckett, Jr.
Assistant District Attorneys
Harris County, Texas

FOR THE DEFENDANT: Mr. C. C. Divine
Mr. Charles W. Gill
Attorneys-at-Law
Houston, Texas

[fols. 2-3] * * *

[fol. 4] MISS JUANITA LAVON PHILLIPS,

Called as a witness on behalf of THE STATE, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q Will you state your full name, please, ma'am?
A Juanita Lavon Phillips.
Q Miss Phillips, are you the sister of Kenneth W. Phillips?
A Yes, sir.
Q Back on the 16th day of June, 1962, how was your brother employed?
A He was employed . . . (interruption)
MR. DIVINE: We would object to the hearsay here, [fol. 5] Your Honor, as it is not material.
THE COURT: That is overruled.
MR. DIVINE: Note our exception.
THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 1

Q (By Mr. Ryan) You may answer that, Miss Phillips.
A He was employed by the 7-11 Stores.
Q Since that time, where has your brother gone?
A He has moved to California.
MR. DIVINE: Your Honor, we are going to object to any explanation—may I approach the Bench?
THE COURT: Your objection is overruled—finish your objection, and then you may approach the Bench, counsel.
MR. DIVINE: We object to the effort on the part of the State to excuse the absence of a witness. Obviously he is not here, or he wouldn't be asking these questions, and it is being proven up now by hearsay, and we object to it.

THE COURT: That is overruled, counsel.
MR. DIVINE: Note our exception.
[fol. 6] THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 2

Q (By Mr. Ryan) Miss Phillips, you say he has gone to California, is that correct?
A Yes, sir.
Q Has he moved there and taken a job and taken up residence in the State of California?
A Yes, sir, he has.
MR. DIVINE: Your Honor, we object to the leading. If it is going to be proven up by this witness, then I would prefer that the witness testify to it. I object on that grounds.
THE COURT: All right, don't lead the witness, counsel.
Q (By Mr. Ryan) Does he intend to return to Texas at this time?
A No, sir, he doesn't.
MR. DIVINE: Your Honor, we are going to object to what his intentions are by this witness.
THE COURT: That's overruled, counsel.
MR. DIVINE: Note our exception to the Court's ruling.
[fol. 7] THE COURT: Yes, sir, counsel.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 3.

Q (By Mr. Ryan) And he is in California at this time?
A Yes, sir.
MR. RYAN: Your Honor, I have nothing further from this witness at this time.
MR. DIVINE: No questions, Your Honor. Your Honor, we move the Court at this time to strike the testimony of this witness that just testified for the following reasons:

That the testimony was offered, for whatever purpose it was offered for, but it was offered by someone who is

not shown to be qualified to testify to what she did testify, as to the knowledge that she might have had, as to where he was, and why he was not present.

It is an effort on the part of the District Attorney to bolster their position and explain why they have not called someone rather than calling that person, or not calling them.

THE COURT: That is overruled, counsel.

[fol. 8] MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 4.

DON ALLEN WEITINGER,

Called as a witness on behalf of THE STATE, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q Will you state your name to the Court and to the Jury, please, sir?

A Don Allen Weitinger.

Q And how are you employed, Mr. Weitinger?

A I am an Assistant District Attorney here in Harris County, Texas.

Q Were you so employed back on the 25th day of June, [fol. 9] 1962, this year?

A Yes, sir.

Q And what were your duties on that date? Where were you assigned?

A I was assigned to the Justice Court Division, handling examining trials on felonies.

Q And did you handle examining trials on that date in the Honorable W.C. Ragan, Justice of the Peace—in Judge Ragan's Court?

A Yes, sir, I did.

Q Did you have an occasion to handle a case styled The State of Texas vs. Bob Granville Pointer?

A Yes, sir, I did.

Q I will ask you were you present during those proceedings?

A Yes, sir, I was.

Q And was a court reporter there taking down the proceedings?

A Yes, sir, he was.

Q And was Mr. Kenneth W. Phillips present, and testified, in that examining trial?

A Yes, sir.

MR. DIVINE: Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant.

[fol. 10] THE COURT: That's overruled, Counsel.

MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 5.

Q (By Mr. Ryan) Was Mr. Kenneth W. Phillips sworn, and did he testify there during the course of that examining trial?

A Yes, sir.

MR. GILL: Just a second—if it please Your Honor, we object to it at this time on the basis that if a predicate is being laid, there hasn't by this witness, as far as examining trial testimony is concerned—there hasn't been an adequate predicate laid, or any evidence shown to explain the absence of the party whose testimony they are attempting to now supplement by the examining trial testimony.

THE COURT: That is overruled, counsel.

MR. GILL: Note our exception.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 6.

Q (By Mr. Ryan) Was this Defendant, Bob Granville

[fol. 11] Pointer, present in the courtroom that day?

A Yes, sir, he was.

Q Do you see that same man who was present there at that examining trial that day in this Courtroom today?

A Yes, sir.

Q Would you point him out for the benefit of the Jury, please, sir?

A Yes, sir, that's Mr. Pointer in the checked shirt sitting by Mr. Divine there at the counsel table.

Q And was he accorded the opportunity of cross examining the witnesses there against him?

A Yes, sir.

MR. DIVINE: We would object to that, if the Court please, accorded the opportunity to cross examine the witnesses at the examining trial—further, there has been no qualification to perpetuate the examining trial testimony. There has been no predicate laid to show that the testimony at the examining trial at the time that it was given anticipated the absence of the witness about whom they are attempting to testify, and that there was no predicate shown—made to show that the defendant, if he was present, was apprised that the witness would be [fol. 12] absent at any trial or future trial, or trials, and that there was no explanation warning him, and he had no opportunity to link his part of the perpetuated testimony.

THE COURT: That is overruled.

MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 7.

Q (By Mr. Ryan) As a matter of fact, Mr. Weitinger, this Defendant, Bob Pointer, did actually cross examine some of those witnesses, didn't he, or one of those witnesses?

A Yes, sir, he did.

MR. DIVINE: We object to what he did, Your Honor, in the absence of the denial of the confrontment of the witnesses against the Defendant.

THE COURT: That is overruled.

MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

MR. DIVINE: May we object further on the grounds that this is certainly leading and suggestive, Your Honor.

THE COURT: Well, it has already been answered, [fol. 13] which was before your objection.

Let's get along, please, gentlemen.

MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

MR. DIVINE: Would you admonish Counsel not to lead the witness, Your Honor?

THE COURT: All right, don't lead the witness.

MR. RYAN: All right, Your Honor.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 8.

MR. RYAN: That's all we have with this witness at this time, Your Honor.

MR. DIVINE: We have no questions, Your Honor.

Your Honor, may the testimony that was just elicited from the last witness, that the Defendant had an opportunity to cross examine be stricken, because it is a basis of a conclusion, and it is a conclusion, and an opinion only, and not a fact.

THE COURT: That's overruled.

MR. DIVINE: Note our exception.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 9.

[fol. 14] JERRY L. HUDGINS,

Called as a witness on behalf of THE STATE, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q State your name to the Court and to the Jury, please.

A Jerry Hudgins.

Q And how are you employed, Mr. Hudgins?
A I am a Court Reporter with the District Attorney's Office, in the Justice Court Division.
Q Were you so employed back on the 25th day of June of this year, 1962?
A Yes, sir.
Q On that date, which Court were you transcribing the proceedings in?
A In Judge W. C. Ragan's Court.
Q I will ask you, sir, if during the course of the proceedings there that afternoon you had occasion to take [fol. 15] down notes and transcribe the proceedings in the case of The State of Texas vs. Bob Granville Pointer?
A Yes, sir, I did.
MR. DIVINE: We object to that, as it is leading, Your Honor.
THE COURT: That is overruled.
MR. DIVINE: Note our exception.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 10.

Q (By Mr. Ryan) And did you correctly take and transcribe those notes?
A Yes, sir, I did, to the best of my ability.
MR. RYAN: Mr. Reporter, will you mark this for purposes of identification as State's Exhibit Number one?

(The above referred to instrument was so marked by the Court Reporter.)

Q (By Mr. Ryan) I will show you what has just been marked for purposes of identification as State's Exhibit Number One, and I will ask you if this is the transcrip-[fol. 16] tion of that examining trial held that afternoon?
A Yes, sir, it is.
MR. DIVINE: If it please the Court, may that answer be stricken and the Jury instructed not to consider it. It is an improper question because he has not laid the proper predicate for it. I would not object if he asked him if he recognized it, and if it was his work, but to state a conclusion that it was a transcript of that particular hearing would be inadmissible.

I pray the Court to sustain my objection.

THE COURT: That's overruled, Counsel.

MR. DIVINE: Note my exception to the ruling of the Court.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 11.

Q (By Mr. Ryan) And calling your attention to the first page of this examining trial transcript, which trial was held on that date, June 25th, 1962, is the first witness that was called to testify there—does that reflect Kenneth [fol. 17] W. Phillips to be the first witness called?

A Yes, sir, it does.

MR. DIVINE: If it please Your Honor, the question is leading, and we object to his leading.

THE COURT: All right, don't lead him.

MR. DIVINE: We object further, if it please Your Honor, to any reading and stating what has been read from this instrument in writing, and if it is offered in evidence, we would like an opportunity to examine it.

THE COURT: All right, Counsel.

MR. RYAN: At this time, Your Honor, the State moves to introduce into evidence the examining trial testimony of Kenneth W. Phillips, save and except those portions marked by brackets in pencil.

THE COURT: All right, let the defense see it, Mr. Ryan. (Mr. Ryan complied with request of the Court, handing exhibit to Mr. Divine.)

MR. DIVINE: If it please Your Honor, before I see this, I would like to make this objection, if I may.

In the perpetuation of testimony elicited by State's [fol. 18] Counsel and State's witnesses at the preliminary hearing, they are not authorized to offer it in portions.

If they offer it, they must offer it in whole and complete, and they are charged with the duty and the responsibility of rebutting any inculpatory testimony incorporated therein.

THE COURT: Do I understand you to mean you want the entire testimony of that Exhibit offered in evidence, that is, of that witness?

MR. DIVINE: I am not offering it at this time.

It is incumbent upon them to offer it, and then if we have an objection to it, why then, we can make our objections, but they must offer it all, or none at all, and they must disprove the inculpatory statements.

THE COURT: All right, then what . . .

MR. RYAN: Your Honor, if we understand Mr. Divine, if he wants it all in, we will move to offer it all in evidence. We have nothing to hide.

THE COURT: Then you are offering all of the testimony of the witness Kenneth W. Phillips into evidence?

[fol. 19] MR. RYAN: Yes, sir, Your Honor.

MR. DIVINE: Don Weitinger, is that who you . . . .

MR. RYAN: No, it is that of Kenneth W. Phillips, his testimony. Don Weitinger is the attorney for the State in that trial—that is, the examining trial.

MR. DIVINE: Your Honor, may we have the Jury retired?

THE COURT: The Jury will retire, please.

THE JURY RETIRED FROM THE JURY BOX, AND THE FOLLOWING PROCEEDINGS WERE HAD OUT OF THE PRESENCE AND HEARING OF THE JURY:

MR. DIVINE: Your Honor, I want to inquire if Counsel has offered all of the testimony of Kenneth W. Phillips? As I understand it, he has.

THE COURT: Well, it is my understanding that he said he wanted to offer all of it except those portions enclosed in brackets, but when you made an objection to that, he said he would offer all of his testimony—that is, all of the testimony of Kenneth W. Phillips.

[fol. 20] MR. DIVINE: All right, Your Honor—May it please Your Honor, we have no objections to this testimony here.

THE COURT: You say you don't want to introduce that?

MR. GILL: It is page two, in brackets and page three, Dillard's cross examination, is what he is talking about, Your Honor.

MR. DIVINE: We do want to introduce this testimony on Page one, Your Honor, that is in brackets, but we do have objections to the extraneous testimony con-

tained on page two, from this bracket to this bracket, Your Honor.

THE COURT: All right . . .

MR. DIVINE: Because it relates to the testimony of the woman.

THE COURT: That's exactly right, counsel.

MR. DIVINE: Now, this is cross examination of the complainant, Mr. Phillips, by the co-defendant by the name of Dillard here on Page three, but since they have offered it, we have no objection to it.

THE COURT: Well, Mr. Divine, they did not offer that. Now, they say they didn't offer that. If you want [fol. 21] it in there, it will be in there.

MR. DIVINE: Well, Your Honor, let me read it. I don't want to offer something I haven't read.

THE COURT: I am just trying to find out what your desires are, Counsel. I am trying to cooperate with you in every way I can.

MR. DIVINE: Thank you, Your Honor, and I am very grateful. (Mr. Divine shows what has been offered in evidence from the examining trial testimony to the Defendant, Bob Granville Pointer.)

Your Honor, we object to the State offering all or any part of it on the grounds that they haven't properly qualified it as perpetuating testimony, first.

THE COURT: You say that this is the same evidence that you took down and recorded and later transcribed of the witness named?

THE WITNESS HUDGINS: Yes, sir.

THE COURT: Anything else, Mr. Divine?

MR. DIVINE: Unless you overrule my objection, I don't have anything else at this time.

THE COURT: Your objection is overruled, Coun- [fol. 22] sel.

MR. DIVINE: Note our exception to the Court's ruling.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 12.

MR. DIVINE: Inasmuch as the Court has overruled my objection to the perpetuating testimony as a whole, then we object to the extraneous matter that is contained on page two of the part that pertains to a previous robbery.

THE COURT: That is sustained.

MR. DIVINE: We will at the proper time, Your Honor, offer the cross examination on behalf of the Defendant of the witness Phillips.

THE COURT: Then you are not objecting to the encircled part, or the part that is in brackets, that is on the first page of this examining trial testimony?

MR. DIVINE: No, sir, I have no objection to it, Your Honor. I want it all in there because the man said: "I wasn't for sure".

THE COURT: All right, in the part that says, he was the one that robbed him before?

[fol. 23] MR. GILL: He is not waiving his prior objections, Your Honor.

THE COURT: No, he is not waiving his prior objections, but he specifically wants that portion on the first page that is in parentheses to go directly to the Jury? Read to the Jury?

MR. DIVINE: No, Your Honor, I say that we object to the entire matter because it is not properly qualified as to perpetuating testimony.

THE COURT: All right, but you have no objection to that part that is included in parentheses on the first page?

MR. DIVINE: To the extraneous contents of that part on the first page, we have no objections to it, Your Honor.

THE COURT: All right.

MR. DIVINE: But for all other purposes, we object, but to the extraneous portion, we do not object.

(The above is the same as Defendant's Bill of Exception No. 12.)

THE COURT: All right, bring the Jury back in, please, Mr. Treadway.

[fol. 24] THE JURY RETURNED TO THE JURY BOX, AND THE FOLLOWING PROCEEDINGS AND TESTIMONY WERE HAD IN THE PRESENCE AND HEARING OF THE JURY:

MR. RYAN: May I read this to the Jury, Your Honor?

THE COURT: Yes, you may.

MR. RYAN READS STATE'S EXHIBIT NUMBER ONE TO THE JURY, AS FOLLOWS, SUBSEQUENT TO SUCH EXHIBIT BEING RECEIVED INTO EVIDENCE BY THE COURT, AND A COPY OF SUCH EXHIBIT IS ATTACHED HERETO AND MADE A PART HEREOF THIS STATEMENT OF FACTS, AT THE REAR OF THIS RECORD:

"At an Examining trial, held on the 25th day of June, A. D., 1962, before Hon. W. C. Ragan, Justice of the Peace, . . ."

MR. DIVINE: If Your Honor please, that was not offered. He just offered the testimony of the witness Phillips. He didn't offer any qualifying introduction at the head of it, or to the heading of it, as we didn't even examine it. Now he is attempting to offer it, and we object to it. If he is offering the testimony of Phillips, [fol. 25] that is the only material reading that he needs to do.

MR. RYAN: Well, this has already been proved up, that it was an examining trial that was held on the 25th of June, 1962, and that was taken from the head of this.

MR. DIVINE: Well, I don't know whether it has been proven up or not, Your Honor, and we object to him reading what's at the head of it.

THE COURT: All right, Mr. Ryan, read where it says "Kenneth W. Phillips."

MR. RYAN: All right, Your Honor.

MR. RYAN CONTINUES READING STATE'S EXHIBIT NO. ONE TO THE JURY, AS FOLLOWS:

"KENNETH W. PHILLIPS, Witness for the State, having been duly sworn, testified as follows:

Q Mr. Phillips, on or about the 16th of June, did you have occasion to see either one of these defendants?

A Yes sir.

Q Was it one or both of them?

A Well, I saw the one in the store and the white [fol. 26] headed gentleman, I believe I saw him down the street from the store.

Q Will you tell us what happened, please?

A Well, it was about 11 o'clock and we was closing up and the young one walked in and I thought I recognized him from—we had been robbed on the 27th of May, Sunday Morning, and I thought it was him but I wasn't for sure, he walked by me and went over to the Dairy Cooler and picked up a six pack of beer and came back to the counter and I went over to wait on him and he lifted his shirt and showed me the gun and said, "this is just like last time, buddy" and I gave him all the money.

Q Approximately how much was that?

A I believe it came to three hundred and some odd dollars, I don't know exactly.

Q And at that time, were you in fear of bodily injury or harm?

A Yes sir, I didn't know what was going to happen.

Q Now then, after he got this three hundred and something dollars, what next happened?

A Well, my sister was waiting for me to get off and she was out in the car and I ran out to the car and he [fol. 27] ran down to the stop sign on Rosslyn and 43rd and turned right and then I jumped in the car to see which was he went and I circled the block and he disappeared and I came back to the store and called the police dispatcher to notify him, to tell him which way he turned on Rosslyn, he was on foot, then I waited for the police to come. This is where I saw a white headed man talking to him.

Q You turned at the stop sign and you saw him there?

A Yes, sir.

Q And you saw him confering with someone?

A Yes sir.

Q Would you know who that would have been?

A I am not for sure.

Q Now then, did you see him later on that day or night?

A That night.

Q You went down to the police station and they had a lineup?

A Yes, sir.

Q At that time, did you make an identification?

A Yes sir.

Q Who did you identify?

A Mr. Pointer and Mr. Dillard."

[fol. 28] MR. RYAN: I have no further questions of this witness at this time, Your Honor.

CROSS EXAMINATION

FOR THE DEFENDANT

By Mr. Divine:

Q How do you pronounce your name?

A Jerry L. Hudgins.

Q Is that H-u-d-g-i-n-s?

A Yes, sir.

Q Do you have any independent recollection of the parties there at the time, the Defendants, Mr. Hudgins?

A No, sir, not right off.

Q Were there two defendants?

A Yes, sir.

Q You said you made this, didn't you?

A Yes, sir.

Q And I see here by the Defendant Dillard, what does that mean? Explain it to the Jury.

A That means that he was not represented by an attorney there, that he was doing the questioning himself.

[fol. 29] Q Mr. Dillard was?

A Yes, sir.

Q And that he was not represented by an attorney there, is that correct?

A Well, that he was doing the questioning himself.

Q Do you know whether or not he was represented by an attorney there?

A No, sir, I . . .

MR. RYAN: Judge, we are going to object to this. This is immaterial to this case. Dillard is not on trial here today, Bob Pointer is.

THE COURT: All right, that is . . .

MR. RYAN: This has nothing to do with what Dillard said—what Dillard said.

MR. DIVINE: If it please Your Honor, it is the testimony of Mr. Phillips, and they offered it all.

MR. RYAN: Just the Direct, not the Cross by any other defendants.

THE COURT: I will let him introduce—you may introduce the cross examination, but I am not going to permit the witness to tell what his understanding of it was.

[fol. 30] MR. DIVINE: May I identify it, Your Honor, that's all I wish to do.

THE COURT: Yes, you may identify it, the Cross Examination, Counsel.

MR. DIVINE: Mr. Reporter, will you mark this, please?

(The above referred to extract from the examining trial testimony of the witness Phillips was marked for purposes of identification on Page three of such testimony as Defendant's Exhibit No. 1, received into evidence and copy of same appears in the rear of this Record.)

Q (By Mr. Divine) I don't know what your recollection was, or what your understanding was, but I want to know what this is, as you started to explain just a while ago. Now, will you tell the Jury just what this is—you have Cross Examination there—what does that mean?

A This "Cross Examination" means the Defendant is cross examining the State's witness, or questioning the State's witness.

Q What defendant?

A I have it down there, Dillard.

Q This is at the same hearing and the same witness? Would you examine this paper and see if that is the

[fol. 31] cross examination of Mr. Phillips?

A Yes, sir.

MR. DIVINE: Read it, Your Honor, and we offer it in evidence.

MR. RYAN: The State has no objection.

MR. DIVINE: May I read it to the Jury, Your Honor?

THE COURT: Yes, go ahead, Counsel.

THE ABOVE DEFENDANT'S EXHIBIT NO. 1 was read to the Jury by Mr. Divine, as follows:

"CROSS EXAMINATION

BY THE DEFENDANT, DILLARD

Q You didn't say you saw me confering with him?

A I saw you at the stop sign.

Q I was over at the corner, my car had a flat tire over there, I didn't see this gentleman.

MR. WEITINGER: Don't testify now, you can ask him questions.

A Well I saw him at the stop sign.

MR. WEITINGER: That is all of this witness."

MR. DIVINE: Your Honor, may I have the indict-[fol. 32] ment in this case? (Court hands indictment to Mr. Divine.)

Q (By Mr. Divine) Do you have your original notes with you, Mr. Hudgins?

A No, sir.

Q You did report this case at the preliminary hearing?

A Yes, sir.

Q Can you examine this instrument in writing and tell me whether you typed that instrument?

A Yes, sir.

Q Was it typed from your original copy of shorthand notes, taken at the preliminary hearing?

A Yes, sir.

Q And would you tell me how many defendants were there?

A Two.

Q Tell me their names.

A Bob Granville Pointer and Lloyd Earl Dillard.

THE COURT: Let me see that—Bob Granville who?

THE WITNESS: Pointer.

Q (By Mr. Divine) Was there anything said out there at that time, Mr. Hudgins, that you made notes of [fol. 33] that may not be contained in this instrument but may be contained in your original notes?

A No, sir.

Q Everything that you took down there in that examining trial in shorthand—did you take it down in writing or with a machine?

A A machine.

Q Everything, then, that you made there as a record there by that shorthand machine you have transcribed into typewritten words?

A Yes, sir.

Q Will you look at this instrument here and tell me whether or not Bob Granville Pointer was represented by counsel?

A He was not represented by counsel.

MR. DIVINE: Your Honor, may I examine this instrument just a little further? I will try not to be too long.

THE COURT: All right, you may.

Q (By Mr. Divine) Mr. Hudgins, will you tell me whether it is your duties, or instructions, or custom, or whatever it is, to report every word that you hear, made by anybody at the preliminary hearing, or just portions of it?

[fol 34] MR. RYAN: If the Court please, we object to the question, as it is multifarious.

THE COURT: Yes, break it down, counsel.

Q (By Mr. Divine) Did you report every word that you heard at this preliminary hearing in regards to what you have just testified about—that is, the testimony of Mr. Phillips?

A Yes, sir, I did, to the best of my ability.

Q Well, what do you mean, "to the best of my ability"? Do you mean by that that you may have overlooked something?

A No, sir.

Q Well, do you say then that your reporting is accurate as to what you heard, or that you may have left something out?

A I would say that it was accurate.

Q Have you examined your original reported notes before testifying to the typewritten portion of it today?

A No, sir.

Q When is the last time that you have seen those original reporting notes?

A When I typed it off of the notes.

[fol. 35] Q And how long after making the report was it that you typed it?

A Probably two days.

Q And you just copied, of course, what your shorthand notes revealed to you?

A Sir?

Q You just copied, at the time of typing this, what your shorthand notes revealed to you?

A Yes, sir.

MR. DIVINE: Your Honor, may I approach the Bench for a request?

THE COURT: All right, you may.

(Attorneys for both the State and the Defendant approach the Bench for a private conversation.)

THE COURT: Any further questions?

MR. DIVINE: No, sir, that's all I have of this witness.

MR. RYAN: That's all the State has with this witness, Your Honor.

[fol. 36] JUANITA PHILLIPS,

having been previously sworn as a witness in behalf of THE STATE, was recalled by the State and testified as follows:

REDIRECT EXAMINATION

For the State

By Mr. Ryan:

Q You are the same Miss Juanita Phillips who previously testified in this case?

A Yes, sir.

Q Miss Phillips, back on June 16th of this year, 1962, did you have occasion to go out to your brother's place of business?

A Yes, sir, I did.

Q And where is that place of business located?

A It is on 43rd Street, 1903 43rd Street, I believe, if I am not mistaken.

Q That is 1903 43rd Street?

A Yes, sir, it is very close to that. I don't know that is the exact address.

Q But that building there is located here in Houston, Harris County, Texas, is that correct?

[fol. 37] A Yes, sir, it is.

Q What type of store did your brother run there?

A It was a 7-11 Store—a drive-in grocery store.

Q About what time was it that you went out there?

A I got there about 10:30.

Q At 10:30 o'clock?

A Yes, sir.

Q Was that at night, P. M.?

A Yes, sir.

Q Now, what was the occasion for your going out there at that time?

A To pick him up from work.

Q What time did he normally close up the store?

MR. DIVINE: We would object to what he normally did, Your Honor.

THE COURT: All right, that is sustained.

Q (By Mr. Ryan) You were going out there to pick him up at that store that night, though, were you not?

A Yes, sir.

Q What time was he going to close that night?

A Eleven o'clock.

Q Now, when you arrived there at this 7-11 Store, where did you park your car?

[fol. 38] A In front of the place.

Q And were you by yourself?

A Yes, sir.

Q Were you in the driver's seat? I assume you were behind the wheel of the automobile?

A Yes, sir.

Q Will you describe the front of that 7-11 Store to us? Is it solid, masonry or is it open?

A It is open. They have sliding doors.

Q They have sliding-glass doors?

A Yes, sir.

Q This was in June of this year. Was that building air-conditioned?

A No, sir.

Q Were all the doors then up? And spread open?

A Yes, sir, they were all open.

Q And you could walk freely into that building from most any location in front of it, couldn't you?

A Yes, sir.

Q Is it well-lit on the inside?

A Yes, sir.

Q And is it light enough there where you were parked to see people and observe their facial characteristics—of any people who were going in the store?

[fol. 39] MR. DIVINE: We object to his leading, if the Court please, about seeing people and observing their facial characteristics.

I wonder if your Honor would strike it, and instruct the Jury not to consider it, and admonish Counsel not to lead the witness.

THE COURT: All right, please don't lead the witness, and the Jury will not consider that for any purpose whatsoever. Let's get along, gentlemen.

Q (By Mr. Ryan) Was it pitch-black dark out there, or was there enough light out there for you to see folks?

A There was . . .

MR. DIVINE: We would object to him calling for the conclusion, if it please Your Honor.

THE COURT: That's overruled.

MR. DIVINE: The basis of our objection, so the record will reflect it, Your Honor, was it light enough out there so you could see. If she describes the conditions, I have no objections, but in drawing a conclusion—that is [fol. 40] an invasion of the province of the Jury.

THE COURT: Let's proceed, gentlemen.

Q (By Mr. Ryan) All right, Miss Phillips, now, when you drove up out there, what, if anything, was the

first thing that you noticed, of any type of unusual nature? What was the first individual that you noticed out there?

A When I drove up, there wasn't anything unusual.

Q What first caught your eye?

A You mean when I first drove up?

Q And shortly thereafter—any time thereafter.

A Oh, well, I got out of the car and went and told Kenneth I was there, and then I came back, and I was sitting in the car, and I noticed this man coming across the lot.

It was kind of unusual for anyone to be out walking that late at night, so I watched him as he came by the car and on into the store.

He went over to the beer counter and got his six-pack of beer and brought it back for Kenneth to check it.

MR. DIVINE: Your Honor, I can't hear the witness.

[fol. 41] MR. RYAN: Miss Phillips, you will have to speak up a little bit, and slow down a little bit, please.

THE WITNESS: Okay.

Q (By Mr. Ryan) You say that you saw this man come in and go back and get some beer, is that correct?

A Yes, sir.

Q Is the cooler-part of it, the refrigerator part of it, is that towards the rear of the store, or towards the front of the store?

A Towards the rear of the store, yes, sir.

Q And where is the cash register where your brother was?

A In front of the store.

MR. DIVINE: If the Court please, that is assuming a fact not testified to and therefore, not leading—where is the cash register where your brother was? How does Counsel know that her brother was at the cash register, and we object to him assuming those facts, Your Honor, because it confuses the record. Would you instruct the Jury, Your Honor?

THE COURT: All right, the Jury will not consider

[fol. 42] that for any purpose whatsoever.

Q (By Mr. Ryan) Let's back up, Miss Phillips. Where was your brother standing?

A At the cash register.

Q Where was the cash register that your brother was standing at, that you just testified to, in relation to the back of the store where the beer was?

A It is in the front of the store.

Q Now, this man that you say you saw come in there, did you get a good look at him?

MR. DIVINE: I will object to that, please, Your Honor. That is again an invasion of the province of the Jury. It is for them to decide whether she got a good look at him.

THE COURT: All right, did you see him, let's get along, gentlemen.

Q (By Mr. Ryan) Did you see him?

A Yes, I did.

Q All right, now, what, if anything, did you do—did this man do, when he was standing there in front of the cash register with this six-pack of beer?

[fol. 43] A Well, when I looked up, I noticed Kenneth's face, and it was just real white.

I noticed the guy pull up his shirt.

Q You saw this man pull up his shirt, is that correct?

A Yes, sir.

Q Did you notice what kind of shirt it was? Was it stuck into his trousers, or was it out loose?

A No, sir, it was out of his trousers, over . . .

Q When you say he pulled up his shirt, did he pull it up in this manner—his shirt-tail was out, and I know mine is not, but he pulled up his shirt-tail?

A Yes, sir.

Q Then what did you see this man do?

A Well, Kenneth, like I said, was real white, and he put the—first he picked up this cigar box full of change to give it to him—well, he wouldn't take that, and Kenneth dropped the cigar box, and then Kenneth put the money in the paper bag. The guy took it and took off.

Q When you say "took off," do you mean he walked slowly out of the store, or what was his manner in leaving the store?

A He ran.

[fol. 44] Q He ran?

A Yes, sir.

Q In which direction did he run?

A Well, toward Roslyn Road. I guess you could say that was south from the store—I am not sure of that direction, but I think it was south.

Q When he left the store, were you still watching this man?

A Yes, sir, I was still in the car.

Q All right, do you see that man that you saw there that night here in the courtroom today?

A Yes, sir, I do.

Q And would you point him out for the benefit of the Jury, please?

A Yes, sir.

MR. DIVINE: We would object, if it please Your Honor, and we object on the grounds that Counsel for The State of Texas pointed the Defendant out to this witness and the other witnesses today at the commencement of his voir dire examination, and we ask the Court to disallow any pointing or identification of the Defendant at this time, because she has had him pointed out to her previously at the commencement of this trial.

[fol. 45] THE COURT: That is overruled, Counsel.

MR. DIVINE: Note our exception to the Court's ruling.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 13.

Q (By Mr. Ryan) Do you see him in the courtroom today?

A Yes, sir, I do.

Q Have you since learned that his name is Bob Pointer, is that correct?

A Yes, sir, I have.

Q All right, now, what did your brother do right after this man ran out of the store?

A Well, I got out of the car and went in the store, and Kenneth said . . .

MR. DIVINE: If the Court please, we object to what he said if it was out of the presence of the Defendant, if he was the one that was there, as it would be hearsay.

THE COURT: That is sustained.

Q (By Mr. Ryan) Now, Miss Phillips, how long had it been from the time that this Defendant had run [fol. 46] out of that store with this money until the time that you got out of your car and had this conversation with your brother, Kenneth?

A Just a matter of seconds.

Q Was it just a few seconds?

A Yes, sir.

Q And was your brother still excited at that time?

A Yes, sir, he was.

MR. DIVINE: If the Court please, he hasn't qualified her as a medical expert to testify about excitement in a human being.

THE COURT: That is overruled, counsel.

MR. DIVINE: Note our exception, and we object on the same grounds with a little different basis, Your Honor, because it is calling for her conclusion as to his condition, being excited. She can describe his appearance.

THE COURT: That is overruled.

MR. DIVINE: Note our exception.

THE COURT: All right.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 14

Q (By Mr. Ryan) And when you first came up there to him, and this was just a few seconds after he had [fol. 47] been robbed, what did your brother say to you?

MR. DIVINE: We would object, if the Court please, to assuming a fact not testified to by Counsel for the State, "after he had been robbed"—there has been no evidence from this witness . . .

MR. RYAN: It's in evidence, Counsel.

MR. DIVINE: May I finish my objection?

MR. RYAN: All right, go ahead.

MR. DIVINE: That there has been any robbery. She hasn't seen any money. She saw a cigar box and a paper sack and a white face, and this man run. Now he wants

to assume that there was a robbery, and he wants to inject into the record "after your brother had been robbed", so that the record will reflect that there was a robbery, because she will acquiesce in the leading question that he asked.

THE COURT: All right, I will sustain it. Let's proceed with this witness, please.

Q (By Mr. Ryan) This was just a few split-seconds after he had run out of that store, is that correct?

A Yes, sir.

Q And you went right in there, and what was the [fol. 48] first thing that your brother said to you?

A He said he had been robbed.

MR. DIVINE: Your Honor, may I—it isn't qualified under the res gestae. We object to it, and it isn't part of the res gestae of the offense. It is hearsay. It's denial of the confrontment of the witnesses. We object to it on those three grounds.

We object to it on the fourth ground that the Court has previously—no less than three times—admonished Counsel of The State of Texas not to lead the witness.

THE COURT: That is overruled.

MR. DIVINE: All four of them, Your Honor?

THE COURT: Yes, sir.

MR. DIVINE: Note our exception on all four grounds, Your Honor.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 15

Q (By Mr. Ryan) And what then did you next do?

A Well, my brother told . . .

MR. DIVINE: We would object, if the Court please, [fol. 49] as it is not responsive, "what did she next do", and she starts telling something about her brother.

THE COURT: All right, that is sustained.

Q (By Mr. Ryan) Let's put it this way, Miss Phillips: What action did you and your brother take together right then, if any?

A (By the witness) Well, right after he told the Assistant Manager to call the police, we got in our car

and followed Mr. Pointer, and we noticed that he went up to the stop sign at Roslyn and 43rd Street, and there he met another gentleman.

The other gentleman went one way and Mr. Pointer went the other way, and Kenneth said not to . . .

MR. DIVINE: If the Court please, we object to anything that Kenneth said.

THE COURT: Yes, that is sustained.

Q (By Mr. Ryan) You can't say anything that Kenneth said—you can't say what was said, Miss Phillips.

A Okay. Anyway, we decided not to follow him too [fol. 50] close, because he . . .

MR. DIVINE: We would object to those conclusions, if Your Honor please, and there are reasons for them.

It is not part of any fact testimony but their own impressions at the time.

THE COURT: All right, don't give your impressions, please.

Q (By Mr. Ryan) Miss Phillips, did you have a conversation with your brother there in the car while you were chasing the Defendant?

A Yes, sir, I did.

Q And as a result of that conversation, you decided not to follow him too closely, is that correct?

A Yes, sir, we did.

Q Did you later return back to the store?

A Yes, sir, we did. After we circled the block, we came on back to the store.

Q And did the police subsequently arrive there on the scene?

A Yes, sir, they did.

Q And did you talk to numerous policemen?

A Yes, sir, I did.

[fols. 51-112] * * *

* * * *

[fol. 113] J. O. PARKER,

Called as a witness on behalf of the STATE, and after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q State your name to the Court and to the Jury, please.

A J.O. Parker.

Q How are you employed?

A City of Houston Police Department.

Q Which division of the City of Houston Police [fol. 114] Department are you assigned to?

A The Robbery Division.

Q Were you so assigned back on the 16th day of June of this year, 1962?

A Yes, sir.

Q On that date, did you have an occasion to make a call to investigate an alleged robbery out at the 7-11 Store on West 43rd Street?

A Yes, sir.

Q Upon arriving there at the scene, did you talk to anyone—not what was said—but did you talk to anyone?

A Yes, sir.

Q And who did you talk to?

A I talked with the witness Miss Phillips, and Mr. James.

Q As a result of that conversation, what action did you take?

A Upon talking with these witnesses, they told . . .

Q Not what they told you, but what action did you take after talking to these witnesses?

A After talking to these witnesses, I went to the intersection of West 43rd and Roslyn Street.

At this particular intersection . . .

Q Officer Parker, I ask you to look around to this [fol. 115] diagram here on this blackboard—this line here representing West 43rd Street, and this line representing Roslyn—and this indicating the 7-11 Store.

Did you go to that intersection of West 43rd Street and Roslyn?

A Yes, sir.

Q What did you find there at that intersection, if anything?

A I found a black, 1950 Lincoln automobile.

Q And where was that automobile parked?

A Do you want me to show you on the blackboard there?

Q Yes, please come over here and mark it, in relation to that 7-11 Store.

A I would say it was approximately in this area here, next to the curb.

Q All right, you can have your seat back there on the stand (witness resumes witness stand); now, what was the condition of this automobile when you found it there?

A Well, the automobile had a flat tire. The right front tire was flat.

Q And did you check the engine?

A Yes, sir.

[fol. 116] Q And what was the condition of the engine?

A The engine was warm.

Q And what does that indicate to you?

A Well, it would indicate that . . . (interruption)

MR. DIVINE: We would object to what it indicated, Your Honor.

THE COURT: That is sustained.

Q (By Mr. Ryan) The engine was warm, is that correct?

A Yes, sir, that's correct.

Q And were there other officers that came out there to the scene later on?

A Yes, sir.

MR. RYAN: That's all. I pass the witness, Your Honor.

* * * *

[fols. 117-119] * * *

[fol. 120] R. F. KINSEY,

Called as a witness on behalf of THE STATE, and after having been first duly sworn and cautioned to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q State your name to the Court and to the Jury, please.

A R. F. Kinsey.

Q And how are you employed, Mr. Kinsey?

A Houston Police Department.

Q Which division in the Houston Police Department are you assigned to?

A Radio Patrol, K-9 Division.

Q And by "K-9 Division"—will you explain to the Jury what that means?

A I have a German Shepherd police dog that is trained for police work.

Q All right, Officer Kinsey, on the night of the 16th [fol. 121] of June, 1962, did you have occasion to go out on West 43rd Street, in the 1900-block, to investigate a robbery?

A Yes, sir, I did.

Q When you arrived at the scene, where did you go?

A As I was approaching that location, two of the Robbery Detail detectives hailed me and pointed out an abandoned car with a flat tire at the intersection of West 43rd Street and Roslyn.

Q Was your dog with you that night?

A Yes, sir.

Q And what did you and your dog do?

A We were informed by the Robbery detectives . . .

Q Not what they told you, now, but what did you do?

A I got out of my car at the scene and checked the car over and through information—it was alleged to have been involved in a robbery.

MR. DIVINE: We would object to that, Your Honor.

THE COURT: That is sustained.

MR. DIVINE: Would you instruct the Jury, Your Honor?

THE COURT: Yes, sir. The Jury will not consider [fol. 122] that last answer for any purpose whatsoever.

Q (By Mr. Ryan) You can't tell what anybody else told you, Officer, but did you have a conversation with the Robbery detectives when you arrived out there?

A Yes, sir, I did.

Q As a result of that conversation, did you take any action, with your dog?

A Yes, sir. I placed him in the front seat of the automobile there.

Q In the front seat of the abandoned automobile, is that correct?

A Yes, sir.

Q And then what did your dog do, and what did you do?

A I placed him there for the purpose of . . .

MR. DIVINE: We would object to his purpose, Your Honor.

THE COURT: All right, that is sustained.

Q (By Mr. Ryan) All right, what did the dog do?

A He picked up a scent.

[fol. 123] MR. DIVINE: We object to that. It is a conclusion on his part.

He can tell what his dog did, but he certainly can't tell about his dog's nose.

THE COURT: All right, that is sustained.

Q (By Mr. Ryan) All right, what did the dog do?

A He reacted in a manner that indicated to me that he had picked up a scent.

MR. DIVINE: We object, Your Honor, to what the indication was.

THE COURT: That is sustained. What did the dog do?

Q (By Mr. Ryan) All right, Officer Kinsey, tell us what the dog did—just what he did.

A He struck out on the trail.

Q He took off on . . . (interruption)

MR. DIVINE: We object to that conclusion, "he struck out on a trail", Judge. If he struck out and went somewhere, we don't object to that, but "on a trail", is by [fol. 124] inference and something this man couldn't possibly know.

THE COURT: I will sustain that objection "he struck out on a trail"—where did he go?

Q (By Mr. Ryan) Did the dog leave the scene abruptly after you put him in the front seat of that automobile?

A Yes, sir, he did.

Q Did you go with him? Did you have him on a leash?

A Yes, sir, I keep him on a leash all the time.

Q And where did he go?

A From the automobile to the front of the 7-11 Store at that location.

Q He went to the front of the 7-11 Store, is that correct?

A Yes, sir.

Q And where did he go from there?

A Across the street and along the edge of a wooded lot directly across the street.

Q Is there a wooded lot across the street from the 7-11 Store?

A It begins being wooded a hundred feet or so back towards Roslyn Road. We followed along the edge of this [fol. 125] wooded lot and then cut through the wooded area there.

Q And who did you next see, if anyone?

A We continued along Roslyn Road to the intersection of Libbey Lane and we saw a subject standing in the front yard of the corner house, behind a tree.

Q What next happened?

A I approached this subject and asked him to step out into the street and identify himself.

At that time, Detectives Durham and Taylor drove up, and we began to interrogate the subject.

Q Do you see this person that you say was behind this tree on that corner in the courtroom today?

A Yes, sir, I do.

Q Would you point him out, for the benefit of the Jury, please?

A It is this party sitting over here, in the green-checked shirt.

Q Have you since learned his name to be Bob Pointer?

A Yes, I have.

Q Now, this other street that you mentioned—did you say Libbey Lane?

A Yes, it is Libbey Lane, I believe it is.

Q Will you turn around and look at that diagram on [fol. 126] the blackboard there?

A Yes, sir.

Q This straight-up-and-down line represents West 43rd Street, and this mark here represents the 7-11 Store, and this representing Roslyn Road.

Now, where is Libbey Lane in relation to that?

A It would be back along this dotted line here, right along in there.

Q About here?

A About there, yes, sir (witness indicates place on blackboard diagram).

Q All right, now, where was it that you saw this Defendant?

A It would be across the street, at the first house on the corner.

Q And the house was here (Mr. Ryan indicates place on blackboard diagram)?

A Yes, sir.

Q And where was the tree that the Defendant was behind?

A Just to one side of the front door.

Q On this side?

A No, it would be facing this way. The front door is here, and there are several large pine trees here (wit- [fol. 127] ness indicates to spot on blackboard diagram).

Q The tree was to one side of the front door, and the front door fronts on Libbey Lane, is that correct?

A Yes, sir.

Q Would you mark where the house is, and where the tree is in relation to the house?

A Yes, sir, the tree is about here, and here is the house (the witness indicates by marking the blackboard diagram, as requested by Mr. Ryan).

Q The tree is right here?

A Yes, it is closer to the house.

Q Right in here?

A Yes, sir.

Q Now, this area between West 43rd Street and Libbey Lane, running parallel to Roslyn Road—what is in that area there?

A Would you indicate again what area you mean?

Q Right in this area here, along Roslyn?

A The first block along Roslyn would be a wooded area. It would be back on the corner of 43rd Street and Roslyn, then some houses from there to this point up here, two other streets, one or two, I am not certain.

[fol. 128] Q There is a wooded area along in there?

A Yes, sir, and then it begins residential area.

Q When you say that Officer Durham of the Robbery Detail came up there about the same time that you were, that was on Roslyn Road?

A Yes, sir, he was on Roslyn Road, there, yes, sir.

MR. RYAN: I pass the witness, Your Honor.

* * * *

[fol. 129-152] * * *

[fol. 153] AUBREY LEE HOOTEN,

Called as a witness on behalf of THE STATE, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q Would you state your name to the Court and to the Jury, please, sir?

A Aubrey Lee Hooten.

Q Where do you live, Mr. Hooten?

A 1803 Libbey Lane.

Q Were you living there back in the month of June of this year, 1962?

A I was, yes, sir.

Q Specifically, on the 16th day of June, 1962?

A Yes, sir.

Q And where is your house located there on Libbey Lane in relationship to Roslyn Street, or Roslyn Road, whichever it is called?

[fol. 154] A It faces Libbey Lane, and the east side of the house is parallel to Roslyn Road.

Q I see, so you are right on the corner, then, of Libbey Lane and Roslyn Road, is that correct?

A Yes, sir, that's correct.

Q Were you at home that night?

A Yes, sir, I was.

Q Did anything of an unusual nature occur on that night?

A It sure did.

Q All right, would you tell me what first happened of an unusual nature on that night?

A I believe it was about 11:30 o'clock one night I had a call to the door, and I got up and answered it, and a young man there wanted to know if he could use the telephone.

He said his car was down the road and it broke down.

Q He told you that his car was down the road and it was broken down, is that what he told you?

A Yes, sir.

Q And he wanted to use your telephone?

A Yes, sir.

Q Did you let him use your telephone?

A I did.

[fol. 155] Q And what did he do with the telephone?

A I showed him where the telephone was, and he asked me if I knew a taxicab number, and I told him I didn't.

I said, "Why don't you just call information and get you a cab?". So he called information, and they wouldn't recommend one, and I said, "Well, just call for a Checker", so they gave him the number of the Checker Cab and so he called the Checker Cab.

He thanked me, and wanted to offer me two or three dollars for my time and trouble, and I told him, no, I didn't want his money, and so he thanked me again and left the house.

Q Did he ask you anything else?

A He wanted to know where would be a good place for him to stand, and I told him I believe right on the corner where the stop sign was.

Q You had some trees out there in your front yard, is that correct?

A That's right.

Q Some trees right near the stop sign?

A There is about nine of them between the stop sign and the bathroom window, and I went to the bathroom, and I looked out the window, and I never did see him. [fol. 156] I thought maybe he was behind one of those trees, and it was—I looked at my watch, and it was twenty-five minutes to 12:00 o'clock midnight.

Q Do you see the man who came in your house there and asked you to use your phone that night here in the courtroom today?

A Yes, sir.

Q Will you point him out, for the benefit of the Jury, please?

A Right over here at the end of the table.

Q You are pointing and indicating the Defendant in this case, Bob Pointer, is that correct?

A Yes, sir.

Q Did you subsequently go out of the house?

A No, I didn't.

Q You didn't come out of the house at any time later that night?

A Well, later—I went back to bed, first.

I saw a big dog and a policeman at the end of a chain, and a flashlight, and then I looked out of the window, and there was a bunch more policemen, and there was lots more detectives.

I asked one of them, I says, "What you all looking for?" [fol. 157] He said, "We are looking for a hijacker", so I grabbed my pants and put them on and went outside, and he had this man on Roslyn Road, leaning up against a car, searching him.

I went over and looked at him, and I told them that I just let that man use my telephone to call a taxicab.

Q You didn't know that you let a robber use your telephone?

A No, I sure didn't.

MR. DIVINE: Your Honor, we object to that. There is no evidence that he is a . . .

THE COURT: All right, I will sustain it to the word "robber". The Jury won't consider the word "robber" for any purpose whatsoever.

Q (By Mr. Ryan) How did Bob Pointer appear that night when he was in there using the phone . . . (interruption)

MR. DIVINE: Your Honor, we object to how he appeared . . .

Q . . . did he appear to be calm, cool and collected, [fol. 158] or agitated and excited?

MR. DIVINE: This witness is not qualified, Your Honor.

THE COURT: That is overruled, Counsel.

MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 17.

Q (By Mr. Ryan) Was he pretty cool about it all, or did he appear to be nervous and excited?

A No, he wasn't nervous at all. He didn't show no nervousness at all.

Q He was very cool, then?

MR. DIVINE: I withdraw my objection, Your Honor.

THE COURT: All right, Counsel.

MR. RYAN: Nothing further. I pass the witness, Your Honor.

[fols. 159-166] * * *

[fol. 167]

* * * *

G. J. DURHAM,

Called as a witness on behalf of the STATE, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

DIRECT EXAMINATION

For the State

By Mr. Ryan:

Q State your name to the Court and to the Jury, please.

A G. J. Durham.

[fol. 168] Q And how are you employed, Mr. Durham?

A Police officer for the City of Houston Police Department.

Q And to which division of the City of Houston Police Department are you assigned?

A The Robbery Division.

Q Were you so assigned back in June of this year, 1962?

A Yes, sir, I was.

Q Specifically on the 16th day of June, that night, did you have an occasion to go out to the location of an alleged robbery in the neighborhood of West 43rd Street?

A Yes, I did.

Q Did you have an occasion that night to see the Defendant in this case?

A Yes, sir, I did.

Q Do you see him here in the courtroom today?

A Yes, sir, I do.

Q Would you please point him out and indicate him, for the benefit of the Jury?

A He is the young boy in the checkered shirt there.

Q And you have since learned his name to be Bob Pointer, is that correct?

A Yes, sir.

[fol. 169] Q When did you first see Pointer that night?

A Approximately 11:50 P. M.

Q And where was it that you saw him?

A I don't recall the exact address of the place where I arrested him.

Q Was that at an intersection?

A Yes, sir, it was.

Q Was Officer Kinsey there with his dog?

A Yes, sir, he was there also.

Q Now, after you arrested Pointer, did you search him?

A Yes, sir, I did.

Q And what, if anything, did you find on him?

A Well, other than his personal papers, and things like that, in his billfold I found approximately eighty-one dollars.

Q And was he placed in a police car?

A Yes, sir, he was.

Q Did Pointer do anything of an unusual nature, to attract your attention while he was in the police car?

A Yes, sir, he did, after I had placed him in the police car and had him in the back seat.

I was sitting in the front seat with the door open, and [fol. 170] he started kicking with his foot under the seat, and I got him back out of the car, and saw that he had kicked his shoe off, for some reason, and I looked in his shoe and found some more money stuck down into his shoe.

Q How much money did you find stuck down in his shoe?

A It was approximately sixty-five dollars.

Q All right, now, you found sixty-five dollars in his right shoe, plus the eighty-one dollars that you found in his wallet—does that total one hundred and forty-six dollars?

A Yes, sir, I believe it does.

MR. RYAN: Mr. Reporter, will you mark this for identification purposes as State's Exhibit Number Eight?

(It was so marked by the Court Reporter).

Q (By Mr. Ryan) I will show you what has just been marked as State's Exhibit Number Eight for identification purposes, and ask you if you can identify that?

A Yes, sir, this is the billfold that he had on him that night.

[fol. 171] Q Is that the money that was found in his shoe and also the money that was found in his billfold?

A I didn't count it. The envelope that it was in was the envelope that I placed it in and I assume that it has been opened.

MR. RYAN: Your Honor, we will introduce that into evidence as State's Exhibit Eight.

MR. DIVINE: We have no objection, Your Honor.

THE COURT: All right, it is in evidence.

(The above-mentioned State's Exhibit No. 8, the billfold, was received into evidence by the Court at this time.)

MR. RYAN: We pass the witness, Your Honor.

[fols. 172-198] • • •

[fol. 199]

• • • •

CROSS EXAMINATION

For the State

By Mr. Ryan:

Q You say your name is Bob Granville Pointer, is that correct?

A Yes, sir.

[fols. 200-212] • • •

[fol. 213] Q You have never been in that grocery store before in your life?

A No, sir.

Q You don't know Kenneth Phillips?

A No, sir, I don't.

Q You don't know anything about that 7-11 Store?

A No, sir, I have no knowledge of that store, other than what I have learned since I have been arrested.

Q And you just happened to have—because your mother had given it to you and you were carrying it around—you just happened to have sixty-five dollars in your shoe and eighty-one dollars in your wallet that night, is that right?

A I had borrowed that money.

Q And you went in—first of all, you said you never went in there at all, is that right?

A In where?

Q In the 7-11 Store.

A No, sir, I haven't.

Q You just happened to be in the neighborhood there, making a phone call because you had an argument with somebody and were looking for a taxi ride home?

A That was my purpose for being at Mr. Hooten's [fol. 214] house, yes, sir.

Q So you never went in that 7-11 Store and told Mr. Phillips, "This is just like last time, buddy"?

A No, sir.

Q You didn't say that?

A No, sir, I certainly didn't.

Q "This is just like last time, buddy"—you didn't say that at all?

A No, sir, I didn't.

Q And you had never been in that 7-11 drive-in store in your life before?

A No.

Q You were at the examining trial when Kenneth Phillips testified, weren't you, the testimony that has been admitted into evidence here today?

A Yes, sir, I was there.

Q Well, what do you think Kenneth Phillips meant when he said . . .

* * * *

[fols. 215-217] * * *

[fol. 218] JIM STUART ROBERTSON,

Called as a witness on behalf of THE STATE, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

DIRECT EXAMINATION

For The State

By Mr. Ryan:

Q Will you tell the Court and the Jury your full name, please, sir?

A Jim Stuart Robertson.

Q Mr. Robertson, where do you live?

A 1629 Viking Street.

Q And where are you employed?

A Sears & Roebuck on South Main.

Q Were you living there on Viking back in May of this year?

A Yes, sir.

Q I will ask you, sir, if on the 27th day of May, 1962, you had occasion to be in the 7-11 drive-in store, located at 1903 West 43rd Street?

[fol. 219] A Yes, that's right.

Q Were you there?

A Yes, sir.

Q And what was your occasion for being there?

A Well, I went down there that morning. It was on a Sunday morning, and I went in there to get a loaf of bread and a gallon jug of milk.

Q Were you there by yourself, or were you with someone?

A No, I had my little boy with me, my little five-year old boy.

Q And about what time of day was this?

A It was about 7:00 o'clock—between 7:15 and 7:30 o'clock on Sunday morning.

Q All right, did you have an occasion to see anyone there that morning, under unusual circumstances?

A Yes, sir.

MR. DIVINE: We would object to any further testimony in this regard, Your Honor, because—may we have the Jury retired, Your Honor?

THE COURT: All right, the Jury may retire.

[fols. 220-221] * * *

[fol. 222] Q (By Mr. Ryan) Mr. Robertson, what of an unusual nature occurred there that morning in the 7-11 Store, the first thing that occurred?

A Well, the first think I got a loaf of bread and a gallon jug of milk and walked up to the counter.

Q Is that where the cash register is?

A Yes, sir, it is.

Q You were standing there in front of the cash register?

A That's right.

Q And who was behind the counter next to the cash register?

A Mr. Phillips, Kenneth Phillips.

Q All right, what else happened?

A My little boy wanted to get a package of cookies, so I told him to go get them, and I turned around to watch him, and at that time I saw a man coming—walking down from 43rd Street—he came around a telephone pole and he walked up beside me, with a sack in his hand.

Q You say a man came into the store with a sack in his hand?

A Yes, sir, that's right.

Q Which side of you did he come to?

A He was on my left side.

[fol. 223] Q Do you see that man here in the courtroom today?

A Yes, sir, I sure do.

Q Will you point him out for the benefit of the Jury, please?

A Here he is over here.

Q You are pointing and indicating the Defendant in this case, Bob Pointer?

A That is correct.

Q Now, after he came into the store there—that's the 7-11 Store located at 1902 West 43rd Street, Houston, Harris County, Texas?

A Yes, sir, that's right.

Q With a sack in his hand, what did this Defendant, Bob Pointer, next do?

A He . . . (interruption)

MR. DIVINE: Your Honor, that is the point of our objection, what he did while he was there.

It is going beyond impeachment, Your Honor.

THE COURT: The same ruling, the same objection the same exception.

MR. DIVINE: Note our exception.

THE COURT: Yes, sir.

[fol. 224] THE PRECEDING IS DEFENDANT'S BILL OF EXCEPTION NO. 25.

Q (By Mr. Ryan) What did Bob Pointer do, in relation to this sack, if anything?

A He walked up beside me and pulled a pistol out of this paper sack, and pointed it at Mr. Phillips, and said, "This is a holdup". He said to me to get my little boy and to get in the back room, which I did.

Q Did you take a look at this pistol?

A Yes, sir, I sure did.

Q I show you what has been marked for identification purposes as State's Exhibit Number Five and ask you if you can identify that, and if it does look to you to be the same type of pistol that Pointer had there?

A Yes, sir, it does look like the same type of pistol, the same pistol.

MR. DIVINE: We object to what it "looks like", Your Honor, unless it is definitely identified—that is, positive identification.

THE COURT: That is overruled, Counsel.

[fols. 225-262] * * *

[fol. 263] STATE'S EXHIBIT No. 1

IN THE JUSTICE COURT

Precinct No. 1

Harris County, Texas

JH

STATE OF TEXAS

vs.

VM/24 6922 Canal

BOB GRANVILLE POINTER

VM/54 7523 Rothwell

LLOYD EARL DILLARD

RBFA

* * * *

At an examining trial, held on the 25th day of June, A. D. 1962, before Hon. W. C. Ragan, Justice of the Peace, sitting as an examining court, the following testimony was heard:

* * * *

MR. DON WEITINGER FOR THE STATE:

* * * *

WM/22 8410 Blankenship
HO55431 works at
7-11 Food Mkt.
1902 W. 43rd St.
Clerk

KENNETH W. PHILLIPS, Witness for the State, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q Mr. Phillips, on or about the 16th of June, did you have occasion to see either one of these defendants?

A Yes sir.

Q Was it one or both of them?

A Well, I saw the one in the store and the white headed gentleman, I believe I saw him down the street from the store.

Q Will you tell us what happened please?

A Well, it was about 11 o'Clock and we was closing up and the young one walked in (and I thought I reeognized him from—we had been robbed on the 27th of May, Sunday Morning, and I thought it was him but I wasn't for sure,) he walked by me and went over to the Dairy Cooler and picked up a six pack of beer and came back to the counter and I went over to wait on him and he lifter [fol. 264] his shirt and showed me the gun and said, "this is just like last time, buddy" and I gave him all the money.

Q Approximately how much was that?

A I believe it came to three hundred and some odd dollars, I don't know exactly.

Q And at that time, were you in fear of bodily injury or harm?

A Yes sir, I didn't know what was going to happen.

* * * *

Q Now then, after he got this three hundred and something dollars, what next happened?

A Well, my sister was waiting for me to get off and she was out in the car and I ran out to the car and he [fol. 265] ran down to the stop sign on Rosslyn and 43rd and turned right and then I jumped in the car to see which was he went and I circled the block and he dissappeared and I came back to the store and called the police dispatcher to notify him, to tell him which way he turned on Rosslyn, he was on foot, then I waited for the police to come, this is where I saw a white headed man talking to him.

Q You turned at the stop sign and you saw him there?

A Yes sir.

Q And you saw him confering with someone?

A Yes sir.

Q Would you know who that would have been?

A I am not for sure.

Q Now then, did you see him later on that day or night?

A That night.
Q You went down to the police station and they had a lineup?
A Yes sir.
Q At that time, did you make an identification?
A Yes sir.
Q Who did you identify?
A Mr. Pointer and Mr. Dillard.

DEFENDANT'S EXHIBIT No. 1

CROSS EXAMINATION
BY THE DEFENDANT, DILLARD

Q You didn't say you say me confering with him?
A I saw you at the stop sign.
Q I was over at the corner, my car had a flat tire over there, I didn't see this gentleman.
MR. WEITINGER: Don't testify now, you can ask him questions
[fol. 266] A Well I saw him at the stop sign.
MR. WEITINGER: That is all of this witness.

* * * *

[fol. 267]

[Reporter's Certificate to foregoing transcript omitted in printing.]

[fol. 268]

[Attorneys' agreement omitted in printing]

[fol. 269] IN THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

vs. No. 101374

BOB GRANVILLE POINTER

Indicted for a Felony: Robbery by Assault

VERDICT AND JUDGMENT—November 7, 1962

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant, BOB GRANVILLE POINTER, appeared in person and by Counsel, C. Gill & C. C. Divine, and both parties announced ready for trial; and the said Defendant, BOB GRANVILLE POINTER in open Court pleaded not guilty to the charge contained in the indictment herein; thereupon a Jury to-wit: Norman R. Forsom and, eleven others, was duly selected, empanelled and sworn, according to law, who having heard the indictment read, and Defendant's plea of not guilty thereto; and having heard the evidence submitted and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court Nov. 7, 1962, the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

"We, the Jury, find the defendant guilty as charged and assess his punishment at confinement in the State Penitentiary for life

Norman R. Forson
Foreman of the Jury"

It, is therefore, considered and adjudged by the Court that the Defendant, BOB GRANVILLE POINTER is guilty of the offense of Robbery by Assault a felony, as found by the jury, and that he be punished as has been determined by confinement in the State Penitentiary for

[fol. 270] Life, and that the State of Texas do have and recover of the said Defendant all costs in the prosecution expended, for which execution will issue, and that the said Defendant be remanded to jail to await the further orders of this Court herein.

* * * *

[fol. 271] IN THE CRIMINAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

vs. No. 101374

BOB GRANVILLE POINTER

SENTENCE AND NOTICE OF APPEAL—January 4, 1963

THIS DAY this cause being again called; the State appeared by the District Attorney and the Defendant's Counsel, C.C. Divine also being present, the Defendant, BOB GRANVILLE POINTER was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant to pronounce sentence against him as follows, to-wit:

"It is the order of the Court that the Defendant, BOB GRANVILLE POINTER who has been adjudged to be guilty of Robbery by Assault, a felony, whose punishment has been assessed by the verdict of the Jury at confinement in the State Penitentiary for life, to be delivered by the Sheriff of Harris County, Texas, immediately to the Director of Corrections of the State of Texas or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Penitentiary for not less than 5 years nor more than life in accordance with

the provisions of the law governing the Texas Department of Corrections."

And the said Defendant is remanded to jail until said [fol. 272] Sheriff can obey the directions of this sentence.

To which action of the Court the defendant in open Court excepts and gives notice of appeal to the Court of Criminal Appeals of the State of Texas in Austin.

And inasmuch as defendant has given notice of appeal herein, the execution of this sentence is deferred to await the Judgment of our Court of Criminal Appeal herein.

* * * *

[fol. 273] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 274] [File Endorsement Omitted]

[fol. 275] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BOB GRANVILLE POINTER, APPELLANT

No. 36,347, *v.*

THE STATE OF TEXAS, APPELLEE

Appeal from Harris County

OPINION—delivered December 18, 1963

The conviction is for robbery; the punishment, life imprisonment.

The state's evidence shows that on the night of June 16, 1962, a man who was positively identified as the appellant entered a 7-11 Food Store and robbed the manager, Kenneth W. Phillips, of more than $300. After obtaining the money, appellant fled from the store and was observed by Phillips talking to a man at a nearby street intersection. When the officers arrived soon after the robbery, an abandoned automobile with a flat tire and the motor still warm was found at the intersection. A police dog, upon being placed in the front seat of the automobile, led the officers to the front of the 7-11 store where the robbery had occurred and then across the street, into a wooded area, to the front yard of a nearby residence, where appellant was standing under the shadow of a tree. A search of appellant's person, following his arrest, revealed that he had $81 in his billfold, and later $65 was found in his shoe after he had kicked it off in the back of the patrol car.

As a witness in his own behalf, appellant denied having committed the robbery and swore that he had never been in the 7-11 store where the robbery occurred. Appellant testified that on the night in question he had been with some friends and that while riding in an automobile with them an argument ensued, whereupon he got out of the automobile to avoid trouble and went to the house where he was apprehended after he had used a telephone to call a taxi.

[fol. 276] The court in his charge submitted appellant's defense of alibi to the jury.

The jury by their verdict rejected appellant's defensive testimony, and we find the evidence amply sufficient to sustain their verdict.

Appellant predicates his appeal upon three points of error.

His first contention is that the court erred in permitting the state to introduce in evidence as state's exhibit #1 a portion of the testimony given by the injured party, Kenneth W. Phillips, at an examining trial held in Justice Court, Precinct No. 1, of Harris County, on June 25, 1962, for the appellant and a co-defendant, Lloyd Earl Dillard.

Appellant insists that a proper predicate was not laid, under Arts. 749 and 750, V.A.C.C.P., to reproduce the testimony, because the state did not show that the witness resided out of the state. The record reflects that prior to admitting the injured party's examining-trial testimony in evidence, his sister testified that since the date of the robbery he had moved to California, where he was employed and had taken up residence, and that he was in California at the time of the trial. Her testimony was sufficient to show that the witness resided out of the state. Conn v. State, 158 S. W. 2d 503; Norton v. State, 186 S. W. 2d 347. It is also contended that the examining-trial testimony should not have been admitted because the proof fails to show that the state attempted to avail itself of the provisions of Art. 486a, V.A.C.C.P., being the Uniform Act to secure attendance of witnesses from without the state.

In Webb v. State, 268 S. W. 2d 136, it was recognized [fol. 277] that the exercise of diligence is not required of either the state or an accused before taking advantage of the right to reproduce testimony of a witness out of the state, under the terms of Arts. 749 and 750, supra. In that case, a claim made by the state that an accused should be denied the right to reproduce testimony because he did not avail himself of the Uniform Attendance of Witnesses Act, Art. 468a, V.A.C.C.P., was rejected.

Appellant also contends that, because he was not represented by counsel at the examining trial, the reproduction

of such testimony and its admission in evidence constituted a denial of due process to him under the Fourteenth Amendment to the Constitution of the United States.

With this contention we do not agree. The examining trial was held prior to return of the indictment against appellant and was not a part of the trial in which he was convicted. An examining trial, under Arts. 245 to 266, V.A.C.C.P., is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail.

Art. 494, V.A.C.C.P., provides for the appointment of counsel for an accused charged with a felony, when it is made known to the court, at an arraignment or any other time, that he is too poor to employ counsel.

Art. 10a, V.A.C.C.P., provides for the appointment of counsel for an accused in a prosecution for an offense less than capital, upon entering a plea of guilty or plea of nolo contendere and waiving trial by jury.

There is no statutory provision in this state for the appointment of counsel for an accused prior to indictment. We have examined the authorities cited by appellant and [fol. 278] do not deem them here controlling. In Gideon v. Wainwright, 83 S. Ct. 792, 9 L. Ed. 2d 799, the accused was denied the assistance of counsel at his trial. In Hamilton v. Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, and Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, the accuseds did not have the assistance of counsel at the time of their arraignment. In White v. Maryland, 83 S. Ct. 1050, —— L. —— Ed., the accused was not represented by counsel when he was arraigned at a preliminary hearing and entered a plea of guilty, which was subsequently introduced in evidence against him upon the trial in which he was convicted. Such are not the facts presented in the instant case.

Appellant's second claim of error is that the court erred in permitting the state to show a certain extraneous offense, committed by him, for the purpose of impeaching him, which had not resulted in a final conviction.

An examination of the record reflects that while testifying on direct examination, appellant stated that he had never been in the 7-11 store where the robbery occurred.

Thereafter, the witness Jim Stuart Robertson was called by the state in rebuttal, and testified that on May 27, 1962, he was in the store and at such time he observed a man whom he identified as appellant enter the store, produce a pistol, point it at the manager, Phillips, and say "'This is a holdup,'" after which Phillips gave appellant some money.

The testimony that the appellant was in the store on May 27, 1962, was properly admitted for the purpose of impeaching appellant's testimony, on direct examination, that he had never been in the store. Lampkin v. State, 85 S. W. 803; Kemp v. State, 247 S.W. 2d 398; Eloms v. State, 264 S. W. 2d 725; Orozco v. State, 301 S.W. 2d 634; Garcia v. State, 322 S. W. 536; and Jones v. State, 332 S. W. 2d 560.

[fol. 279] The appellant is in no position to complain that the witness Jim Stuart Robertson was permitted to testify not only that appellant was in the store on May 27th but that he committed the robbery, the following portion of the testimony of Kenneth W. Phillips at the examining trial having been introduced before the jury after appellant's counsel stated that he had no objection and that "I want it all in there because the man said 'I wasn't for sure'":

["Q Mr. Phillips, on or about the 16th day of June, did you have occasion to see either one of these defendants?] A Yes sir.

["Q Was it one or both of them] A Well, I saw the one in the store and the white headed gentleman, I believe I saw him down the street from the store.

["Q Will you tell us what happened, please?] A Well, it was about 11 o'clock and we *was* closing up and the young one walked in and I thought I recognized him from—we had been robbed on the 27th of May, Sunday Morning,—*and I thought it was him but I wasn't for sure*, he walked by me and went over to the Dairy Cooler and picked up a six pack of beer and came back to the counter and I went over to wait on him and he

lifted his shirt and showed me the gun and said, 'this is just like last time, buddy' and I gave him all the money."

Appellant's remaining point of error is addressed, primarily, to the court's action in refusing to grant a continuance in the case and in overruling a motion made by attorney C. C. Divine to be dismissed as appellant's counsel in the cause.

These complaints to the court's action are presented by certain purported informal bills of exception appearing in a separate statement of facts of the evidence adduced upon the hearing of the motions.

The motion for continuance appears to have been made orally and not in writing, as provided in Art. 540, V.A.C.C.P. Such motion not being in writing, appellant has failed to preserve his complaint to the court's action in refusing to grant a continuance. Berry v. State, 308 S. W. 2d 877.

The complaint to the court's action in refusing the [fol. 280] motion of appellant's attorney, C. C. Divine, to be dismissed as counsel in the case is not such a matter as may be presented by informal bill of exception, under Art. 760e, V.A.C.C.P., and is therefore not properly before us for review.

No reversible error appearing, the judgment is affirmed.

DICE, Judge

Opinion approved by the court.

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 281] • • •

[fol. 282] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BOB GRANVILLE POINTER, APPELLANT

No. 36,347 *vs.*

THE STATE OF TEXAS, APPELLEE

Appeal from Harris County

OPINION ON APPELLANT'S MOTION FOR REHEARING—delivered February 12, 1964

Due to appellant's vigorous brief on motion for rehearing, and his reliance on White v. Maryland, 83 Sup.Ct. 1050, we feel it desirable to further clarify our position in distinguishing the instant case. In the White case it was pointed out that the "preliminary hearing" under Maryland law was as "critical" a stage as arraignment under Alabama law, citing Hamilton v. Alabama, 82 Sup. Ct. 159. In the Hamilton case it was stated that under Alabama law arraignment is a critical stage in a criminal proceeding in that, "* * * the defense of insanity must be pleaded or the opportunity is lost." Also, "pleas in abatment must also be made at the time of arraignment," and further, "It is then that motions to quash based on systematic exclusion of one race from grand juries, or on the ground that the grand jury was otherwise improperly drawn must be made."

The examining trial in Texas is not such a "critical stage" in criminal proceedings as it is under the holdings above cited and quoted. As originally set forth in our opinion in this cause, "An examining trial, under Arts. 245 to 266, V.A.C.C.P. is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail."

We remain convinced that this cause was correctly disposed of in our original opinion. Appellant's motion for rehearing is overruled.

McDONALD, Judge

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 283] SUPREME COURT OF THE UNITED STATES

No. 10 Misc., October Term, 1964

BOB GRANVILLE POINTER, PETITIONER

vs.

TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Criminal Appeals of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 12, 1964

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 577 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 755891 412

PETITION NOT PRINTED

RESPONSE NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 577

BOB GRANVILLE POINTER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 577

BOB GRANVILLE POINTER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Criminal Appeals of Texas (R. 61; 66) are reported at 375 S.W. 2d 293 (1964).

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas was entered on December 18, 1963 (R. 61); Motion for Rehearing was overruled on February 12, 1964 (R. 66); Petition for Certiorari and Motion for Leave to Appeal *in Forma Pauperis* were filed on March 23, 1964, in this Court and docketed as No. 1207 Misc., subsequently redocketed as No. 10 Misc.; Certiorari and leave to appeal *in forma*

pauperis were granted October 12, 1964. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

This appeal involves the Sixth and Fourteenth Amendments to the Constitution of the United States and Articles 245 to 266, Vernon's Annotated Texas Code of Criminal Procedure. These provisions are reprinted in the Appendix, *infra*.

Question Presented

1. The question presented is limited to the point of law raised in *White* v. *Maryland*, 373 U.S. 59, that is: Is a preliminary hearing a critical stage of a criminal proceeding requiring counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States, if it is at such preliminary hearing that the sole opportunity for cross-examination of the complaining witness is made available by the state?

Statement

Procedural history of the case:

The petitioner was charged with the robbery by assault of Kenneth W. Phillips which occurred on or about the 16th day of June, 1962, in Houston, Harris County, Texas (R. 1). At an examining trial (preliminary hearing) conducted before W. C. Ragan, Justice of the Peace, on or about the 25th day of June, 1962, the State of Texas, represented by an assistant district attorney (R. 14), secured the testimony of the complainant, Kenneth W. Phillips (R. 15), concerning the alleged robbery and Mr. Phillips positively identified petitioner as being the person who had

robbed him (R. 25; State's Ex. 1, R. 55, 56, 57). Petitioner was not represented by counsel at the examining trial (R. 28) and the record is devoid of any cross-examination of Mr. Phillips by the petitioner. The record is further silent concerning any intention by the state of reproducing the testimony adduced at the examining trial at a later date. Nor does the record reflect that petitioner was advised that he could have time to procure counsel and the record does not reveal that petitioner requested counsel to be appointed to represent him.

The testimony adduced of Mr. Phillips (R. 24, 25; State's Ex. 1, R. 55, 56, 57) sufficiently established all the elements of the offense of robbery by assault (Article 1408, Vernon's Annotated Texas Penal Code, reprinted in the Appendix, *infra*) (cf. *Cranford* v. *State*, Tex. Cr. App. 377 S.W. 2d 957 (1964)).

Petitioner was indicted for the offense of robbery by assault (R. 1) on the 16th of July, 1962. On November 6, 1962, the petitioner was put to trial in Criminal District Court of Harris County, Texas, for the offense of robbery by assault (R. 11).

The complaining witness, Kenneth W. Phillips, at the time of trial was in the State of California (R. 12). No showing of diligence on the part of the state to secure the attendance of Mr. Phillips is divulged by the record. The state, over objection of petitioner's trial counsel (R. 12, 14, 15, 16, 21 and 22), was permitted to reproduce the testimony of the complainant through the court reporter who had transcribed the proceedings in Judge W. C. Ragan's Court in the case of *The State of Texas* v. *Bob Granville Pointer* (R. 23, 24 and 25). Counsel objected to the introduction of the examining trial testimony on procedural grounds as well as objecting to the state's failure to secure the attendance of Mr. Phillips on the ground that

such procedure was a denial of the right to be confronted by the witnesses against him (R. 15 and 16).

On the 7th day of November, 1962, petitioner was convicted by a jury of the offense of robbery by assault and sentenced to life imprisonment (R. 58). On January 4, 1963, the petitioner was formally sentenced by the trial court and at that time gave his notice of appeal to the Court of Criminal Appeals of Texas (R. 59 and 60).

In the Court of Criminal Appeals of Texas:

In the original opinion for affirmance of this cause issued by the Hon. Judge Dice on December 18, 1963, the opinion being approved by the Court of Criminal Appeals of Texas, it is stated that petitioner had contended that the reproduction of the testimony and its admission into evidence was a denial of due process to him under the Fourteenth Amendment to the Constitution of the United States. After noting that the examining trial was held prior to the return of the indictment and that there is no provision for appointment of counsel prior to indictment in Texas, Judge Dice held:

> " * * * We have examined the authorities cited by appellant and do not deem them here controlling. In Gideon v. Wainwright, 83 S. Ct. 792, 9 L. Ed. 2d 799, the accused was denied the assistance of counsel at his trial. In Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, and Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, the accuseds did not have the assistance of counsel at the time of their arraignment. In White v. Maryland, 83 S. Ct. 1050, —— L. Ed., the accused was not represented by counsel when he was arraigned at a preliminary hearing and entered a plea of guilty, which was subsequently introduced in evidence against him upon the trial in

which he was convicted. Such are not the facts presented in the instant case" (R. 63).

In the Opinion on Motion for Rehearing issued by the Hon. Judge McDonald, on February 12, 1964, the Court said:

> "Due to appellant's vigorous brief on motion for rehearing, and his reliance on White v. Maryland, 83 S. Ct. 1050, we feel it desirable to further clarify our position in distinguishing the instant case. In the White case it was pointed out that the 'preliminary hearing' under Maryland law was as 'critical' a stage as arraignment under Alabama law, citing Hamilton v. Alabama, 82 Sup. Ct. 159. In the Hamilton case it was stated that under Alabama law arraignment is a critical stage in a criminal proceeding in that, ' • • • the defense of insanity must be pleaded or the opportunity is lost.' Also, 'pleas in abatement must also be made at the time of arraignment,' and further, 'It is then that motions to quash based on systematic exclusion of one race from grand juries, or on the ground that the grand jury was otherwise improperly drawn must be made.'
>
> "The examining trial in Texas is not such a 'critical stage' in criminal proceedings as it is under the holdings above cited and quoted. As originally set forth in our opinion in this cause, 'An examining trial, under Arts. 245 to 266, V.A.C.C.P. is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail" (R. 66).

The petitioner in the Court of Criminal Appeals of Texas consistently and continually contended that this cause was governed by this Honorable Court's decision in *White* v. *Maryland*. The Court of Criminal Appeals of Texas, however, distinguished the case at bar with this Court's de-

cisions in *White, Gideon,* and *Hamilton,* maintaining that since the purpose of examining trials in Texas was to "determine whether the defendant is to be discharged, committed to jail, or admitted to bail" that the examining trial, in Texas, is not a critical stage of a criminal proceeding.

Summary of Argument

We submit that cross-examination of a witness is a right guaranteed to an accused in a criminal proceeding under the Fourteenth Amendment to the Constitution of the United States and that the opportunity for such cross-examination is a "critical stage" of the criminal proceeding requiring the assistance of counsel, and, unless intelligently and understandingly waived by an accused, the introduction into evidence of testimony adduced at a time when the accused did not have the assistance of counsel is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

This Court in *White* v. *Maryland,* 373 U.S. 59, held:

> "Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case a 'critical' a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel."

Numerous decisions by this Court have pointed to the many "critical" areas in which an accused needed the assistance of counsel to assure him of due process of law as guaranteed by the Fourteenth Amendment to the Con-

stitution of the United States. *Powell* v. *Alabama*, 287 U.S. 45, held that in a capital case that the accused "requires the guiding hand of counsel at every step in the proceedings against him." In *Hudson* v. *North Carolina*, 363 U.S. 697 (Mr. Justice Clark and Mr. Justice Whittaker, dissenting), this Court found "special circumstances" to have existed, requiring counsel, by reason of a plea of guilty of a co-defendant (who was represented by counsel) during the trial. The majority opinion of this Court found that such circumstances "made this a case where the denial of counsel's assistance operated to deprive the defendant of due process of law guaranteed by the Fourteenth Amendment • • • " because of the "prejudicial position in which petitioner found himself when his co-defendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken."

In *Ferguson* v. *Georgia*, 365 U.S. 570, this Court held that Georgia, in implementing the provisions of its incompetency law, could not, consistent with the Fourteenth Amendment, " • • • deny appellant the right to have his counsel question him to elicit his statement." This Court, in *Hamilton* v. *Alabama*, 368 U.S. 52, held that arraignment, under Alabama law, " • • • is a critical stage in a criminal proceeding. It is then that the defense of insanity must be pleaded • • • pleas in abatement must also be made • • • motions to quash based on systematic exclusion of one race from the grand juries • • • or on the ground that the grand jury was otherwise improperly drawn • • • must be made."

In still another context, this Honorable Court in *Carnley* v. *Cochran*, 369 U.S. 506, reversed the conviction when the Court found that " • • • the assistance of counsel might well have materially aided petitioner in coping with several aspects of the case." Among the several "aspects" found to exist which required counsel, this Court pointed out that, "Although both petitioner and his wife testified that they

had experienced disciplinary problems with the children, and thus clearly revealed a possibly significant avenue for impeachment of the children's testimony, there was no cross-examination worthy of the name. We hold that petitioner's case was one in which the assistance of counsel, unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment."

This Honorable Court vacated and remanded with directions the case of *Walton* v. *Arkansas*, 371 U.S. 29, in which petitioner contended that he was not represented by counsel at the time of his arraignment in the course of which he acknowledged the voluntariness of his confession; such acknowledgment, he contended, was later used against him at the trial in which he was convicted.

The monumental decision of this Honorable Court in *Gideon* v. *Wainwright*, 372 U.S. 335, declared that in all criminal prosecutions an accused has the right to counsel and an indigent defendant has a right to have counsel appointed for him.

In the recent case of this Court of *Massiah* v. *United States*, —— U.S. ——, 84 S. Ct. 1199 (Mr. Justice White, joined by Mr. Justice Clark and Mr. Justice Harlan, dissenting), held that an accused is entitled to representation by counsel at every critical stage of the prosecution, saying:

> "This view no more than reflects a constitutional principle established as long ago as Powell v. Alabama, • • • , where the Court noted that '• • • during perhaps the most critical period of the proceeding • • • that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants • • • (are) as much entitled to such aid (of counsel) during that period as at the trial itself.' Id., 287 U.S., at 57, 53 S. Ct. at

59, 77 L. Ed. 158. And since the Spano decision the same basic constitutional principle has been broadly reaffirmed by this Court." (Citing *Hamilton, White, Gideon, supra.*)

Massiah, ibid., was concerned with federal agents surreptitiously obtaining incriminating statements from petitioner after he had retained a lawyer, pleaded not guilty and had been released on bail. The statements so obtained were introduced in evidence against him at the trial in which he was convicted.

Finally, in *White* v. *Maryland,* 373 U.S. 59, this Court found, as previously noted, *supra,* that the "preliminary hearing" in Maryland, in that case, was a critical stage of the criminal proceedings, for a plea was taken from the petitioner at a time he had no counsel and was later introduced into evidence against him at the trial in which he was convicted.

In the case at bar we contend that the examining trial was a critical stage of the criminal proceeding, for it was at this time that the complaining witness was made available to the petitioner for cross-examination purposes and at a time when he had no counsel. This Court in *Alford* v. *United States,* 282 U.S. 687, held that "Cross-examination of a witness is a matter of right." Mr. Justice Stone, speaking for the Court, said:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that

> prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. * * * In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. * * * "

We submit that in this case petitioner's trial counsel was summarily denied, *in limine*, "all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination." *Alford, ibid.* We say that petitioner's trial counsel should have been in a position to cross-examine Mr. Phillips concerning his testimony, to wit, "Well, it was about 11 o'clock and we was closing up and the young one walked in and I thought I recognized him from—we had been robbed on the 27th of May, Sunday Morning, and I thought it was him, but I wasn't for sure, * * *." This was surely a "significant avenue for impeachment" of the testimony, *Carnley* v. *Cochran*, 369 U.S. at 511. Petitioner's trial counsel, in order to impeach the complainant's identification of petitioner, was relegated to the dilemma of admitting positive identification or attempting, with the means at hand, of impeaching the identification by permitting the admission of highly prejudicial testimony concerning an extraneous offense (R. 24; State's Ex. 1, R. 56). We feel that by admitting this testimony, petitioner was not represented by counsel during a portion of the trial upon which he was convicted.

Only the presence of counsel at the examining trial could have explored, by cross-examination of the witness, the possibility of mistaken identification. Only the presence of counsel at the examining trial could have explored the possibility that there was another witness to the robbery

(Mr. Phillips stated that "*we* was closing up * * * " R. 24; State's Ex. 1, R. 56). Only by the "guiding hand of counsel" at the examining trial could petitioner's rights have been safeguarded.

As stated in *Escobedo* v. *Illinois*, —— U.S. ——, 84 S. Ct. 1758 at 1763, in a different context:

> "In Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, we held that every person accused of crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U.S. 330, 334, 77 S. Ct. 510, 519, 1 L. Ed. 2d 376 (Black, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. There is nothing that counsel can do for them at trial."' Ex Parte Sullivan, D.C., 107 F. Supp. 514, 517-518."

As we understand the decisions of this Court, there can be no question of waiver of the right to counsel in this case for it is not shown that petitioner intelligently and understandingly waived counsel, *Carnley* v. *Cochran*, 369 U.S. 506, 516. Further, it would be the height of unreason to charge the petitioner with the responsibility of hiring counsel for the examining trial, or asking that counsel be appointed, when the avowed purpose of such examining trials is to determine "whether the defendant is to be discharged, committed to jail, or admitted to bail" (R. 66).

It is not our purpose on this appeal to impose upon the State of Texas the duty of appointing counsel for an accused prior to indictment. However, when, as here, the ex-

amining trial testimony, adduced at a time when the accused does not have counsel, is attempted to be reproduced at the trial on the merits, then, in such event, the accused should be forewarned of the plan of the state to introduce the testimony on the trial of the merits and give the accused an opportunity, prior to the examining trial, to secure counsel. The Rules of Criminal Procedure of Texas (Appendix, *infra*) provide ample means of preserving testimony. In the alternative, the State of Texas can utilize the Uniform Act to Secure Witnesses from Without the State (Appendix, *infra*).

Bound as we are by the record in this case it seems reasonable to conclude that this case is one where the examining trial was a "critical stage of the criminal proceeding" and petitioner was entitled to have the "guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45. We submit that the introduction of the examining trial testimony, in this case, was a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States and that *White* v. *Maryland* governs the disposition of this cause.

Conclusion

For the reasons heretofore stated and so that justice may be done, we pray that this Honorable Court reverse and remand this cause to the Court of Criminal Appeals of Texas.

Respectfully submitted,

ORVILLE A. HARLAN
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806 Houston First Savings Building
Houston, Texas 77002

APPENDIX

Sixth Amendment, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1408, Vernon's Annotated Texas Penal Code:

> "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; * * *"

Article 245, Vernon's Annotated Texas Code of Criminal Procedure:

> "When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 246, Vernon's Annotated Texas Code of Criminal Procedure:

> "The magistrate may at the request of either party postpone the examination to procure testimony; but the accused shall in the meanwhile be detained in custody unless he give bail to be present from day to day before the magistrate until the examination is concluded, which he may do in all cases except murder and treason."

Article 247, Vernon's Annotated Texas Code of Criminal Procedure:

> "Before the examination of the witnesses, the magistrate shall inform the accused that it is his right to make a statement relative to the accusation brought against him, but at the same time shall also inform him that he cannot be compelled to make any statement whatever, and that if he does make such statement, it may be used in evidence against him."

Article 248, Vernon's Annotated Texas Code of Criminal Procedure:

> "If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. His statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused by affixing his name or mark, but shall not be sworn to by him. The magistrate shall attest by his own certificate and signature to the execution and signing of the statement."

Article 249, Vernon's Annotated Texas Code of Criminal Procedure:

> "The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed in charge of an officer, so that the testimony given by one witness shall not be heard by any of the others."

Article 250, Vernon's Annotated Texas Code of Criminal Procedure:

> "If any person appear to prosecute as counsel for the State, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the State or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

Article 251, Vernon's Annotated Texas Code of Criminal Procedure:

> "The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."

Article 252, Vernon's Annotated Texas Code of Criminal Procedure:

> "The examination of each witness shall be in the presence of the accused."

Article 253, Vernon's Annotated Texas Code of Criminal Procedure:

> "The testimony of each witness shall be reduced to writing by or under the direction of the magistrate, and shall then be read over to the witness, or he may read it over himself. Such corrections shall be made in the same as the witness may direct; and he shall then sign the same by affixing thereto his name or mark. All the testimony thus taken shall be certified to by the magistrate."

Article 254, Vernon's Annotated Texas Code of Criminal Procedure:

> "The magistrate has the power in all cases, where a witness resides or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this he

may do without having previously issued a subpoena for that purpose."

Article 255, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate may issue an attachment for a witness to any county in the State, when affidavit is made by the party applying therefor that the testimony of the witness is material to the prosecution, or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness; and, if the facts set forth are not considered material by the magistrate, or, if they be admitted to be true by the adverse party, the attachment shall not issue."

Article 256, Vernon's Annotated Texas Code of Criminal Procedure:

"A witness attached need not be tendered his witness fees or expenses."

Article 257, Vernon's Annotated Texas Code of Criminal Procedure:

"The officer receiving the attachment shall execute it forthwith by bringing before the magistrate the witness named therein, unless such witness shall give bail for his appearance before the magistrate at the time and place required by the writ."

Article 258, Vernon's Annotated Texas Code of Criminal Procedure:

"After examining the witnesses in attendance, if it appear to the magistrate that there is other important testimony which may be had by a postponement, he shall, at the request of the prosecutor or of the defendant, postpone the hearing for a reasonable time to enable such testimony to be procured; but in such case the accused shall remain in the custody of the proper

officer until the day fixed for such further examination. No postponement shall take place, unless a sworn statement be made by the defendant, or the prosecutor, setting forth the name and residence of the witness, and the facts which it is expected will be proved. If it be testimony other than that of a witness, the statement made shall set forth the nature of the evidence. If the magistrate is satisfied that the testimony is not material, or, if the same be admitted to be true by the adverse party, the postponement shall be refused."

Article 259, Vernon's Annotated Texas Code of Criminal Procedure:

"Upon examination of one accused of a capital offense, no magistrate other than a judge of the Court of Criminal Appeals, district court or county court, shall have power to discharge the defendant. Any magistrate may admit to bail, except in capital cases where the proof is evident."

Article 260, Vernon's Annotated Texas Code of Criminal Procedure:

"Where it is made to appear by affidavit to a judge of the Court of Criminal Appeals, district or county court, that the bail taken in any case is insufficient in amount, or that the sureties are not good for the amount, or that the bond is for any reason defective or insufficient, such judge shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case."

Article 261, Vernon's Anotated Texas Code of Criminal Procedure:

"After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require."

Article 262, Vernon's Annotated Texas Code of Criminal Procedure:

> "If there is no safe jail in the county in which the prosecution is carried on, the magistrate may commit to the nearest safe jail in any other county."

Article 263, Vernon's Annotated Texas Code of Criminal Procedure:

> "The commitment in the case mentioned in the preceding article shall be directed to the sheriff of the county to which the defendant is sent, but the sheriff of the county from which the defendant is taken shall be required to deliver the prisoner into the hands of the sheriff to whom he is sent."

Article 264, Vernon's Annotated Texas Code of Criminal Procedure:

> "A commitment is an order signed by the proper magistrate directing the sheriff to receive and place in jail the person so committed. It will be sufficient if it have the following requisites:
>
> * * * * *"

Article 265, Vernon's Annotated Texas Code of Criminal Procedure:

> "Every sheriff shall keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner. He may summon a guard of sufficient number, in case it becomes necessary to prevent an escape from jail, or the rescue of a prisoner."

Article 266, Vernon's Annotated Texas Code of Criminal Procedure:

> "A discharge by a magistrate upon an examination of any person accused of an offense shall not prevent a second arrest of the same person for the same offense."

Article 749, Vernon's Annotated Texas Code of Criminal Procedure:

> "Depositions taken in criminal actions shall not be read unless oath be made that the witness resides out of the State; or that since his deposition was taken, the witness has died; or that he has removed beyond the limits of the State; or that he has been prevented from attending the court through the act or agency of the defendant; or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or that, by reason of age or bodily infirmity, such witness cannot attend. When the deposition is sought to be used by the State, the oath may be made by any credible person. When sought to be used by the defendant, the oath shall be made by him in person."

Article 750, Vernon's Annotated Texas Code of Criminal Procedure:

> "The deposition of a witness taken before an examining court or jury of inquest, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the preceding article for the reading of depositions."

Article 486a, Vernon's Annotated Texas Code of Criminal Procedure:

> "Section 1. This Act may be cited as the 'Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings.'
>
> • • • • •
>
> "Section 3. If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies under seal of such court that there is a criminal prosecution pending in such court,

or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

"If at a hearing the judge determines that the witness is material and necessary, that it will not cause undo hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, (and any other state through which the witness may be required to pass by ordinary travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where the grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

* * * * * "

FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

NO. 577

BOB GRANVILLE POINTER, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR RESPONDENT

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LIST OF AUTHORITIES

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The Opinions of the Court of Criminal Appeals of Texas (R. 61, 66) are reported at 375 S.W.2d 293 (1964).

JURISDICTION

The Judgment of the Court of Criminal Appeals of Texas was entered on December 18, 1963 (R. 61); Motion for Rehearing was overruled on February 12, 1964 (R. 66); the Court of Criminal Appeals of Texas issued its Mandate on the 28th day of February, 1964; Petition for Certiorari and Motion for Leave to Appeal in Forma Pauperis was filed on March 23, 1964, in this Court and docketed as No. 1207, Misc., subsequently re-docketed as No. 10 Misc.; Certiorari and Leave to Appeal in forma pauperis were granted October 12, 1964. The Jurisdiction of this Court rests on 28 U.S.C., § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Sixth and Fourteenth Amendments to the Constitution of the United States. The pertinent statutory and constitutional provisions are printed in the Appendix, infra.

QUESTIONS PRESENTED

I.

Where the purpose of an examining trial under Texas law is to determine whether the Defendant is to be discharged, committed to jail, or admitted to bail; is this such a "critical stage" of the proceedings as to deny him his constitutional rights where he is not represented by an attorney?

II.

Under the facts of this case did Petitioner intelligently and understandingly waive his constitutional rights to have counsel?

STATEMENT

On the 16th day of June, 1962, Kenneth W. Phillips was employed as manager of a 7-11 Food Market Store at 1902 West 43rd Street, in Houston, Harris County, Texas, and on that date the Petitioner entered the grocery store at approximately 10:45 p.m., produced a pistol and demanded money from Mr. Phillips. Petitioner was charged with the robbery by assault of Kenneth W. Phillips.

Prior to return of the indictment, an Examining Trial (Preliminary Hearing) was held in Justice

Court, Precinct No. 1, Harris County, Texas, on June 25, 1962, for the Petitioner and a co-defendant, Lloyd Earl Dillard. Assistant District Attorney Don Allen Weitinger represented the State of Texas at the hearing (R. 14). Petitioner was not represented by counsel at the Examining Trial (R. 28). The testimony of Kenneth W. Phillips was reduced to writing by the court reporter in question and answer form (R. 55, 57) and although the record does not show any cross-examination of Mr. Phillips by the Petitioner, it is reflected that Petitioner did in fact cross-examine some of the witnesses (R.16). Petitioner at no time requested that counsel be appointed to represent him at the Examining Trial.

Petitioner was indicted for the offense of robbery by assault on the 16th day of July, 1962 (R. 1). On August 14, 1962, this case was called to trial and passed on behalf of Petitioner because he did not have an attorney to represent him at that time (R. 6). On September 17, 1962, this case was once again called for trial but on motion of Petitioner was passed once again to give him and his family an opportunity to hire an attorney to represent him (R. 6, 8). At that time the Trial Court appointed Charles W. Gill, a member of the Houston Bar, to represent Petitioner in the event that he did not obtain counsel of his own choosing (R. 6). On November 6, 1962, the Petitioner was put to trial in Criminal District Court of Harris County, Texas for the offense of robbery by assault (R. 11). Petitioner was represented by Mr. Charles W. Gill, counsel appointed by the Trial Court, and by C. C. Devine, counsel of his own choosing (R. 10).

At the Examining Trial (Preliminary Hearing) Kenneth W. Phillips testified on behalf of the State

of Texas and was cross-examined by Petitioner's accomplice. (R. 25; State's Ex. 1, R. 55, 56, 57.)

The complaining witness, Kenneth W. Phillips, at the time of the trial had moved permanently to California (R. 12). He had taken up residence and had obtained a job in the State of California (R. 13). He did not intend to return to Texas (R. 13). At the trial the State of Texas was permitted to reproduce the testimony of the complainant, Kenneth W. Phillips, through the court reporter who had transcribed the proceedings in Judge W. C. Reagan's Court in the case of the *State of Texas v. Bob Granville Pointer* (R. 19, 23, 24, 25).

On the 7th day of November, 1962, notwithstanding his plea of not guilty, Petitioner was convicted by a jury of the offense of robbery by assault and sentenced to life imprisonment (R. 58). On January 4, 1963, Petitioner was sentenced by the Trial Court and at that time gave notice of appeal to the Court of Criminal Appeals of Texas (R. 59, 60).

The Court of Criminal Appeals of Texas, the highest Court having jurisdiction in criminal cases in this State, affirmed the conviction of the Petitioner on the 18th day of December, 1963. The Court stated in part as follows:

> "His first contention is that the court erred in permitting the state to introduce in evidence as state's exhibit #1 a portion of the testimony given by the injured party, Kenneth W. Phillips, at an examining trial held in Justice Court, Precinct No. 1, of Harris County, on June 25, 1962, for the appellant and a co-defendant, Lloyd Earl Dillard.
>
> "Appellant insists that a proper predicate was not laid under Arts. 749 and 750, V.A.C.C.P., to

reproduce the testimony, because the state did not show that the witness resided out of the state. The record reflects that prior to admitting the injured party's examining-trial testimony in evidence, his sister testified that since the date of the robbery he had moved to California, where he was employed and had taken up residence, and that he was in California at the time of the trial. Her testimony was sufficient to show that the witness resided out of the state. Corn v. State, 158 S.W.2d 503; Norton v. State, 186 S.W.2d 347. It is also contended that the examining-trial testimony should not have been admitted because the proof fails to show that the state attempted to avail itself of the provisions of Art. 486a, V.A.C.C.P., being the Uniform Act to secure attendance of witnesses from without the state.

"In Webb v. State, 268 S.W.2d 136, it was recognized (fol. 277) that the exercise of diligence is not required of either the state or an accused before taking advantage of the right to reproduce testimony of a witness out of the state, under the terms of Arts. 749 and 750, supra. In that case, a claim made by the state that an accused should be denied the right to reproduce testimony because he did not avail himself of the Uniform Attendance of Witnesses Act, Art. 468a, V.A.C.C.P., was rejected.

"Appellant also contends that, because he was not represented by counsel at the examining trial, the reproduction of such testimony and its admission in evidence constituted a denial of due process to him under the Fourteenth Amendment to the Constitution of the United States.

"With this contention we do not agree. The examining trial was held prior to return of the indictment against appellant and was not a part of the trial in which he was convicted. An examining trial, under Arts. 245 to 266, V.A.C.C.P., is for the purpose of determining whether the defendant

is to be discharged, committed to jail, or admitted to bail.

"Art. 494, V.A.C.C.P., provides for the appointment of counsel for an accused charged with a felony, when it is made known to the court, at an arraignment or any other time, that he is too poor to employ counsel.

"Art. 10a, V.A.C.C.P., provides for the appointment of counsel for an accused in a prosecution for an offense less than capital, upon entering a plea of guilty or plea of nolo contendere and waiving trial by jury.

"There is no statutory provision in this state for the appointment of counsel for an accused prior to indictment. We have examined the authorities cited by appellant and do not deem them here controlling. In Gideon v. Wainwright, 83 S. Ct. 792, 9 L.Ed.2d 799, the accused was denied the assistance of counsel at his trial. In Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114, and Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, the accuseds did not have the assistance of counsel at the time of their arraignment. In White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, the accused was not represented by counsel when he was arraigned at a preliminary hearing and entered a plea of guilty, which was subsequently introduced in evidence against him upon the trial in which he was convicted. Such are not the facts presented in the instant case." (R. 62, 63.)

On Motion for Rehearing, the Honorable Judge McDonald, speaking for the Court, stated:

"Due to appellant's vigorous brief on motion for rehearing, and his reliance on White v. Maryland, 83 Sup.Ct. 1050, we feel it desirable to further clarify our position in distinguishing the instant case. In the White case it was pointed out that the 'preliminary hearing' under Maryland law was as

'critical' a stage as arraignment under Alabama law, citing Hamilton v. Alabama, 82 Sup.Ct. 159. In the Hamilton case it was stated that under Alabama law arraignment is a critical stage in a criminal proceeding in that, '* * * the defense of insanity must be pleaded or the opportunity is lost.' Also, 'pleas in abatement must also be made at the time of arraignment,' and further, 'It is then that motions to quash based on systematic exclusion of one race from grand juries, or on the ground that the grand jury was otherwise improperly drawn must be made.'

"The examining trial in Texas is not such a 'critical stage' in criminal proceedings as it is under the holdings above cited and quoted. As originally set forth in our opinion in this cause, 'An examining trial, under Arts. 245 to 266, V.A.C.C.P. is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail.' " (R. 66)

ARGUMENT

I.

The Examining Trial was *not* a critical stage of the proceedings, and the Court was not obligated to appoint counsel to represent Petitioner therein especially in the absence of a request by the Petitioner for an appointment of counsel by the Court.

The Preliminary Hearing, or Examining Trial, as it is commonly called in the State of Texas, is not one in which the accused is called upon to enter a plea, nor is it necessary for him to advance any defenses at this stage of the proceedings. The purpose of such hearing is merely to determine whether there is enough evidence to show probable cause for holding the accused in confinement or admitting him to bail prior to

the time the grand jury considers the case. Our statutes provide that the accused shall have time to procure counsel, Article 245, V.A.C.C.P. The examination may be postponed in order that he may obtain counsel, Article 246, V.A.C.C.P. A magistrate is required to give the accused proper warning before witnesses are examined. The accused is warned that he need not make any statement, but he may do so if he wishes, Articles 247 and 248, V.A.C.C.P.

The statutes contemplate that the prosecution may not even be represented in the Examining Trial, but provides that if anyone representing the prosecution is present, they may have the right to question or cross-examine witnesses. The accused, or his counsel, has the same right. Should no counsel appear, either for the State or for the Petitioner, the magistrate may examine the witnesses; and the accused has the same right, Article 250, V.A.C.C.P.

The testimony of each witness is reduced to writing by or under the direction of the magistrate, and is then read over to the witness and corrections are then made and then he signs his name, Article 253, V.A.C.C.P.

There are distinctions that may be drawn between the present case and the cases of *White v. Maryland,* 373 U.S. 59, and *Hamilton v. Alabama,* 368 U.S. 52.

An examining trial in the State of Texas, pursuant to Article 245, V.A.C.C.P., does not perform the same function as the preliminary trials did in the cases of *White v. Maryland,* supra, and *Hamilton v. Alabama,* supra. In Texas the examining trial is not an arraignment and the accused does not enter a plea. In Texas, an accused is not required to advance any defenses at an examining trial, and a failure to do so does not

preclude him from availing himself from every defense he may have upon the trial of the case.

In *White v. Maryland,* supra, the preliminary hearing in Maryland constituted an arraignment in which the accused was forced to plead to the offense. He entered a plea of guilty without advice of counsel, and later in the trial of his case, the plea of guilty was introduced into evidence against him. In the case of *Hamilton v. Alabama,* supra, the preliminary hearing which was held amounted to an arraignment of the accused. Arraignment, under the Alabama law, was a critical stage in a criminal proceeding because the defendant was required, under Alabama law, at that time to plead the defense of insanity or the opportunity to do so would be lost. In Alabama, various pleas in abatement must be made at the time of arraignment. Motions to quash the indictment, based on the grounds of systematic exclusion of one race from grand juries, must be made at that time, and other defenses may be advanced at that stage of the proceeding or are lost.

The examining trial in Texas is not such a "critical stage" in criminal proceedings as it is under the holdings of the above cited cases. An examining trial, under Articles 245 to 266, V.A.C.C.P., is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail. *Childers v. State,* 30 Crim.Rep. 160, 16 S.W. 903.

II.

Should the Court find that Petitioner had a constitutional right to court appointed counsel, Respondent would, show that Petitioner intelligently and understandingly waived such right and that Petitioner's rights were fully protected in: 1. That Petitioner was

confronted by the witness, Kenneth W. Phillips, at the Examining Trial; 2. That the witness, Phillips, was duly sworn and testified under oath at the Examining Trial; 3. That Petitioner was afforded the opportunity to cross-examine Phillips; 4. That Petitioner did in fact cross-examine some of the witnesses at the Examining Trial; 5. That Phillips had permanently left the State of Texas and had obtained a job and permanent residence in the State of California; 6. That Petitioner was no stranger to the legal processes, nor was he lacking in intelligence or understanding of the benefits of counsel, but was in fact acquainted with several lawyers in the community and had in fact employed at least three attorneys to represent him in previous criminal cases in which he was a defendant; 7. That Petitioner failed to request counsel and in fact refused court appointed counsel when tendered.

If an error was committed by the Trial Court in admitting Phillip's testimony which was adduced at the Examining Trial, it was harmless error, because, aside from the testimony of Kenneth Phillips, there was other evidence at the Trial sufficient to support the finding of guilty by the jury. The evidence includes a positive identification of the Petitioner made by an eye-witness to the robbery, Juanita Phillips (R. 34). It also includes the testimony of Officer R. F. Kinsey of the Radio Patrol, K-9 Division, of the Houston Police Department, who testified that he and his dog traced the path of the Petitioner from the scene of the crime to the place of Petitioner's apprehension (R. 42). In addition, there is the testimony of Officer G. J. Durham of the City of Houston Police Department, Robbery Division, who testified that he assisted in the apprehension of the Petitioner, that in the course of

this apprehension, he found upon the person of Petitioner, approximately $81.00 in his billfold, and $65.00 secreted in his right shoe, approximating the sum of $146.00 (R. 49). The record also contains testimony of Jim Stewart Robertson, a private citizen, whose testimony impeached that of the Petitioner to the effect that he had never been in the 7-11 Food Store which he stands convicted of having robbed on the 16th day of June, 1962 (R. 52, 53).

PETITIONER INTELLIGENTLY AND UNDERSTANDINGLY WAIVED THE ASSISTANCE OF COUNSEL AT THE EXAMINING TRIAL

The record shows that Petitioner retained Mr. Sam Hoover, of the Houston Bar, and paid him $600.00 to represent him on a number of cases (R. 4, 5). It is further shown that a Mr. John Cutler, a member of the Houston Bar, represented Petitioner in a prior case (R. 7). It is also shown that Petitioner had made arrangements at one time for Mr. Clyde Gordon, also of the Houston Bar, to represent him in that same case (R. 7). In the instant case, it is shown at (R. 7) that Mr. C. C. Devine had been approached by Petitioner's relatives to see about obtaining his services to represent Petitioner in this case.

On September 17, 1962, after the Court had passed the case on August 14, 1962, because Petitioner had failed to hire counsel, the Court appointed Charles W. Gill to represent Petitioner in the event that he did not employ counsel to represent him at the trial (R. 5, 6, 7). At that time Petitioner gave a very clear indication that he had no desire of being represented at his trial by a court appointed lawyer as is shown by

Petitioner's testimony on cross-examination by the Assistant District Attorney:

"Q. And isn't it a fact that when he came up here to talk to you about this case that you just didn't want to talk to him about it?

"A. I told him—No, Sir. I told him my people were trying to get me a lawyer, then. That's exactly what I told Mr. Gill, that I would let him know. Right then, my people were telling me every week—they were telling me that they were going out to get some money together to get me a lawyer.

"Q. But Mr. Gill did tell you that he had been appointed by the Court to represent you in this case?

"A. Yes, Sir, he did tell me that he had been appointed by the Court.

"Q. And you did refuse to talk to him about your case? That was your choice, wasn't it?

"A. Well, I told him I didn't want to talk to him.

"Q. You told him that you didn't want to talk to him, even after he told you that he was your lawyer and had been appointed by the Court, isn't that right?

"A. I told him that I didn't want to talk to him at that time, that I would let him know if I . . .

"Q. And that has been over a month ago, isn't that right?

"A. Mr. Gill has been up to see me twice, and I told him the same thing both times."

This is a clear indication that Petitioner did not want the services of a court appointed lawyer and relied on his family being able to hire counsel to represent him.

It should be noted that the offense was committed and arrest made on the 16th day of June, 1962, and that the Preliminary Hearing was held on June 25, 1962. Petitioner, who was acquainted with a number of lawyers, had at least nine days from the time of the arrest to the date of the hearing to procure the services of counsel.

Petitioner was by no means a stranger to the legal process, but was experienced in the ways and means of procuring competent counsel, and knowledgeable of his right thereto. He should not now be heard to complain that he was so poor and ignorant of his situation that he could not intelligently and understandingly waive his right to private counsel or to court appointed counsel, if any.

Previous to his trial, Petitioner did not at any time assert that he was a pauper and unable to obtain counsel. Neither did Petitioner at any time, either prior to the Examining Trial or the trial on the merits, ever request the appointment of counsel, but on the contrary, he consistently refused counsel when offered and in fact refused to talk to Charles W. Gill, a leading and highly respected member of the Harris County Criminal Bar, whom the Court had appointed on its own motion to represent Petitioner. Charles W. Gill was appointed by the Court not because Petitioner requested the appointment of counsel or because Petitioner was an indigent, but because the Court had given Petitioner ample opportunities to hire his own lawyer and Petitioner had not done so, and the case had been passed twice previously on motion of the Petitioner for additional time in which to employ an attorney, and the Court, with an already over-crowded

docket, in its discretion felt it necessary to proceed with the case (R. 5, 6, 10).

In *Carnley v. Cochran*, 369 U.S. 506, this Court held that an accused could intelligently and understandingly waive his constitutional rights to counsel.

Respondent urges that if this standard can be met, that it was met in this case where Petitioner did not request counsel but refused same when offered.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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CERTIFICATE OF SERVICE

I, Allo B. Crow, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I have heretofore entered my appearance in the Supreme Court of the United States in the above captioned cause in behalf of the Respondent; I certify that a copy of the foregoing brief has been forwarded by United States Mail, with first class postage prepaid, to Petitioner's Attorney of Record, Orville A. Harlan, 806 Houston First Savings Building, Houston, Texas 77002.

ALLO B. CROW, JR.
Assistant Attorney General

APPENDIX

Sixth Amendment, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1408, Vernon's Annotated Texas Penal Code:

> "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; * * *"

Article 245, Vernon's Annotated Texas Code of Criminal Procedure:

> "When the accused has been brought before a magistrate, that officer shall proceed to examine

into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 246, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate may at the request of either party postpone the examination to procure testimony; but the accused shall in the meanwhile be detained in custody unless he give bail to be present from day to day before the magistrate until the examination is concluded, which he may do in all cases except murder and treason."

Article 247, Vernon's Annotated Texas Code of Criminal Procedure:

"Before the examination of the witnesses, the magistrate shall inform the accused that it is his right to make a statement relative to the accusation brought against him, but at the same time shall also inform him that he cannot be compelled to make any statement whatever, and that if he does make such statement, it may be used in evidence against him."

Article 248, Vernon's Annotated Texas Code of Criminal Procedure:

"If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. His statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused by affixing his name or mark, but shall not be sworn to by him. The magistrate shall attest by his own certificate and signature to the execution and signing of the statement."

Article 249, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed in charge of an officer, so that the testimony given by any one witness shall not be heard by any of the others."

Article 250, Vernon's Annotated Texas Code of Criminal Procedure:

"If any person appear to prosecute as counsel for the State, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the State or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

Article 251, Vernon's Annotated Texas Code of Criminal Procedure:

"The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."

Article 252, Vernon's Annotated Texas Code of Criminal Procedure:

"The examination of each witness shall be in the presence of the accused."

Article 253, Vernon's Annotated Texas Code of Criminal Procedure:

"The testimony of each witness shall be reduced to writing by or under the direction of the magistrate, and shall then be read over to the witness, or he may read it over himself. Such corrections shall be made in the same as the witness may direct; and he shall then sign the same by affixing thereto his name or mark. All the testimony thus taken shall be certified to by the magistrate."

Article 254, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate has the power in all cases, where a witness resides or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this he may do without having previously issued a subpoena for that purpose."

Article 255, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate may issue an attachment for a witness to any county in the State, when affidavit is made by the party applying therefor that the testimony of the witness is material to the prosecution, or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness; and, if the facts set forth are not considered material by the magistrate, or, if they be admitted to be true by the adverse party, the attachment shall not issue."

Article 256, Vernon's Annotated Texas Code of Criminal Procedure:

"A witness attached need not be tendered his witness fees or expenses."

Article 257, Vernon's Annotated Texas Code of Criminal Procedure:

"The officer receiving the attachment shall execute it forthwith by bringing before the magistrate the witness named therein, unless such witness shall give bail for his appearance before the magistrate at the time and place required by the writ."

Article 258, Vernon's Annotated Texas Code of Criminal Procedure:

"After examining the witnesses in attendance, if it appear to the magistrate that there is other

important testimony which may be had by a postponement, he shall, at the request of the prosecutor or of the defendant, postpone the hearing for a reasonable time to enable such testimony to be procured; but in such case the accused shall remain in the custody of the proper officer until the day fixed for such further examination. No postponement shall take place, unless a sworn statement be made by the defendant, or the prosecutor, setting forth the name and residence of the witness, and the facts which it is expected will be proved. If it be testimony other than that of a witness, the statement made shall set forth the nature of the evidence. If the magistrate is satisfied that the testimony is not material, or, if the same shall be admitted to be true by the adverse party, the postponement shall be refused."

Article 259, Vernon's Annotated Texas Code of Criminal Procedure:

"Upon examination of one accused of a capital offense, no magistrate other than a judge of the Court of Criminal Appeals, district court or county court, shall have power to discharge the defendant. Any magistrate may admit to bail, except in capital cases where the proof is evident."

Article 260, Vernon's Annotated Texas Code of Criminal Procedure:

"Where it is made to appear by affidavit to a judge of the Court of Criminal Appeals, district or county court, that the bail taken in any case is insufficient in amount, or that the sureties are not good for the amount, or that the bond is for any reason defective or insufficient, such judge shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case."

Article 261, Vernon's Annotated Texas Code of Criminal Procedure:

"After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require."

Article 749, Vernon's Annotated Texas Code of Criminal Procedure:

"Depositions taken in criminal actions shall not be read unless oath be made that the witness resides out of the State; or that since his deposition was taken, the witness has died; or that he has removed beyond the limits of the State; or that he has been prevented from attending the court through the act or agency of the defendant; or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or that, by reason of age or bodily infirmity, such witness cannot attend. When the deposition is sought to be used by the State, the oath may be made by any credible person. When sought to be used by the defendant, the oath shall be made by him in person."

Article 750, Vernon's Annotated Texas Code of Criminal Procedure:

"The deposition of a witness taken before an examining court or jury of inquest, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the preceding article for the reading in evidence of depositions."

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, *v.* State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Black delivered the opinion of the Court.

The Sixth Amendment provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence."

Two years ago in *Gideon* v. *Wainwright*, 372 U. S. 335, we held that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the States. The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right "to be confronted with the witnesses against him," which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment.

The petitioner Pointer and one Dillard were arrested in Texas and taken before a state judge for a preliminary hearing (in Texas called the "examining trial") on a charge of having robbed Kenneth W. Phillips of $375 "by assault, or violence, or by putting in fear of life or bodily injury," in violation of Texas Penal Code Art. 1408. At this hearing an Assistant District Attorney conducted the prosecution and examined witnesses, but neither of the defendants, both of whom were laymen, had a lawyer. Phillips as chief witness for the State gave his version of

the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint. Apparently Dillard tried to cross-examine Phillips but Pointer did not, although Pointer was said to have tried to cross-examine some other witnesses at the hearing. Petitioner was subsequently indicted on a charge of having committed the robbery. Some time before the trial was held, Phillips moved to California. After putting in evidence to show that Phillips had moved and did not intend to return to Texas, the State at the trial offered the transcript of Phillips' testimony given at the preliminary hearing as evidence against petitioner. Petitioner's counsel immediately objected to introduction of the transcript, stating, "Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant." Similar objections were repeatedly made by petitioner's counsel but were overruled by the trial judge, apparently in part because, as the judge viewed it, petitioner had been present at the preliminary hearing and therefore had been "accorded the opportunity of cross examining the witnesses there against him.". The Texas Court of Criminal Appeals, the highest state court to which the case could be taken, affirmed petitioner's conviction, rejecting his contention that use of the transcript to convict him denied him rights guaranteed by the Sixth and Fourteenth Amendments. 375 S. W. 2d 293. We granted certiorari to consider the important constitutional question the case involves. 379 U. S. 815.

In this Court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon* v. *Wainwright*, *supra*. In making that argument petitioner relies mainly on *White* v. *Maryland*, 373 U. S. 59, in which this Court reversed a conviction based in part upon evi-

dence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in *Hamilton* v. Alabama, 368 U. S. 52, was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve. In this case the objections and arguments in the trial court as well as the arguments in the Court of Criminal Appeals and before us make it clear that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him. It is that latter question which we decide here.

I.

The Sixth Amendment is a part of what is called our Bill of Rights. In *Gideon* v. *Wainwright*, *supra*, in which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that "a provision of the Bill of Rights

which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." 372 U. S., at 342. And last Term in *Malloy* v. *Hogan*, 378 U. S. 1, in holding that the Fifth Amendment's guarantee against self-incrimination was made applicable to the States by the Fourteenth, we reiterated the holding of *Gideon* that the Sixth Amendment's right-to-counsel guarantee is "'a fundamental right, essential to a fair trial,'" and "thus was made obligatory on the States by the Fourteenth Amendment." 378 U. S., at 6. See also *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52. We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, *e. g.*, 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts* throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby* v. *United States*, 174 U. S. 47, 55, 56, referred to the

*See state and English cases collected in 5 Wigmore, Evidence §§ 1367, 1395 (3d ed. 1940). State constitutional and statutory provisions similar to the Sixth Amendment are collected in 5 Wigmore, *supra*, § 1397, n. 1.

right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most if not of all the States composing the Union." Mr. Justice Stone, writing for the Court in *Alford v. United States*, 282 U. S. 687, 692, declared that the right of cross-examination is "one of the safeguards essential to a fair trial." And in speaking of confrontation and cross-examination this Court said in *Greene* v. *McElroy*, 360 U. S. 474,

> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." 360 U. S., at 496–497 (footnote omitted).

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 U. S. 257, this Court said:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in Court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S., at 273 (footnote omitted).

And earlier this Term in *Turner* v. *Louisiana*, 379 U. S. 466, 472–473, we held:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Compare *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 103–104.

We are aware that some cases, particularly *West* v. *Louisiana*, 194 U. S. 258, 264, have stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply. See also *Stein* v. *New York*, 346 U. S. 156, 195–196. But of course since *Gideon* v. *Wainwright*, *supra*, it no longer can broadly be said that the Sixth Amendment does not apply to state courts. And as this Court said in *Malloy* v. *Hogan*, *supra*, "This Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." 378 U. S., at 5. In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-

incrimination, is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan*, *supra*, 378 U. S., at 10.

II.

Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. See, *e. g.*, *Dowdell* v. *United States*, 221 U. S. 325, 330; *Motes* v. *United States*, 178 U. S. 458, 474; *Kirby* v. *United States*, 174 U. S. 47, 55–56; *Mattox* v. *United States*, 156 U. S. 237, 242–243. Cf. *Hopt* v. *Utah*, 110 U. S. 574, 581; *Queen* v. *Hepburn*, 7 Cranch 290, 295. This Court has recognized the admissibility against an accused of dying declarations, *Mattox* v. *United States*, 146 U. S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox* v. *United States*, 156 U. S. 237, 240–244. See also *Dowdell* v. *United States*, *supra*, 221 U. S., at 330; *Kirby* v. *United States*, *supra*, 174 U. S., at 61. Nothing we hold here is to the contrary. The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare *Motes* v. *United States*, *supra*, 178 U. S., at 474. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them. Because the transcript of

Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, *v.* State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Harlan, concurring in the result.

I agree that in the circumstances the admission of the statement in question deprived the petitioner of a right of "confrontation" assured by the Fourteenth Amendment. I cannot subscribe, however, to the constitutional reasoning of the Court.

The Court holds that the right of confrontation guaranteed by the Sixth Amendment in federal criminal trials is carried into state criminal cases by the Fourteenth Amendment. This is another step in the onward march of the long-since discredited "incorporation" doctrine (see, *e. g.*, Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965)), which for some reason that I have not yet been able to fathom has come into the sunlight in recent years. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643; *Ker* v. *California*, 374 U. S. 23; *Malloy* v. *Hogan*, 378 U. S. 1.

For me this state judgment must be reversed because a right of confrontation is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325, reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth.

While either of these constitutional approaches brings one to the same end result in this particular case, there is a basic difference between the two in the kind of future constitutional development they portend. The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of ordered liberty." The philosophy of "incorporation," on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights (but see *Ker* v. *California*, *supra*, at 34) and increasingly subjects state legal processes to enveloping federal judicial authority. "Selective" incorporation or "absorbtion" amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be deemed "fundamental," it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental.

It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court. The "incorporation" doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Stewart, concurring.

I join in the judgment reversing this conviction, for the reason that the petitioner was denied the opportunity to cross-examine, through counsel, the chief witness for the prosecution. But I do not join in the Court's pronouncement which makes "the Sixth Amendment's right of an accused to confront the witnesses against him . . . obligatory on the States." That questionable *tour de force* seems to me entirely unnecessary to the decision of this case, which I think is directly controlled by the Fourteenth Amendment's guarantee that no State "shall deprive any person of life, liberty, or property, without due process of law."

The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is "[o]ne of the fundamental guarantees of life and liberty," [1] and "one of the safeguards essential to a fair trial." [2] It is, I think, as indispensable an ingredient as the "right to be tried in a courtroom presided over by a judge." [3] Indeed, this Court has said so this very Term. *Turner* v. *Louisiana*, 379 U. S. 466, 472–743.[4]

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[1] *Kirby* v. *United States*, 174 U. S. 47, 55.

[2] *Alford* v. *United States*, 282 U. S. 687, 692.

[3] *Rideau* v. *Louisiana*, 373 U. S. 723, 727.

[4] See also *In re Murchison*, 349 U. S. 133, where the Court said that "due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." 349 U. S., at 134.

Here that right was completely denied. Therefore, as the Court correctly points out, we need not consider the case which could be presented if Phillip's statement had been taken at a hearing at which the petitioner's counsel was given a full opportunity to cross-examine. See *West* v. *Louisiana*, 194 U. S. 258.

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Goldberg, concurring.

I agree with the holding of the Court that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Ante*, at —. I therefore join in the opinion and judgment of the Court. My Brother Harlan, while agreeing with the result reached by the Court, deplores the Court's reasoning as "another step in the onward march of the long-since discredited 'incorporation' doctrine," *ante*, at —. Since I was not on the Court when the incorporation issue was joined, see *Adamson* v. *California*, 332 U. S. 46, I deem it appropriate to set forth briefly my view on this subject.

I need not recapitulate the arguments for or against incorporation whether "total" or "selective." They have been set forth adequately elsewhere.[1] My Brother

[1] See *Adamson* v. *California*, *supra*, at 59 (concurring opinion of Mr. Justice Frankfurter); *id.*, at 68 (dissenting opinion of Mr. Justice Black); *Malloy* v. *Hogan*, 378 U. S. 1; *id.*, at 14 (dissenting opinion of Mr. Justice Harlan); *Gideon* v. *Wainwright*, 372 U. S. 335, 345 (concurring opinion of Mr. Justice Douglas); *id.*, at 349 (concurring opinion of Mr. Justice Harlan); *Poe* v. *Ullman*, 367 U. S. 497, 509 (dissenting opinion of Mr. Justice Douglas); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746; Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865 (1960); Brennan, The Bill of Rights and the States, 36 N. Y. U. L.

BLACK'S view of incorporation has never commanded a majority of the Court, though in *Adamson* it was assented to by four Justices. The Court, in its decisions has followed a course whereby certain guarantees "have been taken over from the early articles of the Federal Bill of Rights and brought within the Fourteenth Amendment," *Palko* v. *Connecticut*, 302 U. S. 319, 326, by a process which might aptly be described as "a process of absorption." *Ibid.* See *Cohen* v. *Hurley*, 366 U. S. 117, 154 (dissenting opinion of MR. JUSTICE BRENNAN); Brennan, The Bill of Rights and the States, 36 N. Y. U. L. Rev. 761 (1961). Thus the Court has held that the Fourteenth Amendment guarantees against infringement by the States the liberties of the First Amendment,[2] the Fourth Amendment,[3] the Just Compensation Clause of the Fifth Amendment,[4] the Fifth Amendment's privilege against self-incrimination,[5] the Eighth Amendment's prohibition of cruel and unusual punishments,[6] and the Sixth Amendment's guarantee of the assistance of counsel for an accused in a criminal prosecution.[7]

With all deference to my Brother HARLAN, I cannot agree that this process has "come into the sunlight in re-

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Rev. 761 (1961); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L. J. 74 (1963).

[2] See, *e. g.*, *Gitlow* v. *New York*, 268 U. S. 652, 666; *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296; *New York Times Co.* v. *Sullivan*, 376 U. S. 254.

[3] See *Wolf* v. *Colorado*, 338 U. S. 25; *Mapp* v. *Ohio*, 367 U. S. 643.

[4] *Chicago, B. & Q. R. Co* v. *Chicago*, 166 U. S. 226.

[5] *Malloy* v. *Hogan*, 378 U. S. 1.

[6] *Robinson* v. *California*, 370 U. S. 660.

[7] *Gideon* v. *Wainwright*, 372 U. S. 335.

cent years." *Ante*, at ——. Rather, I believe that it has its origins at least as far back as *Twining* v. *New Jersey*, 211 U. S. 78, 99, where the Court stated that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226." This passage and the authority cited make clear that what is protected by the Fourteenth Amendment are "rights," which apply in every case, not solely in those cases where it seems "fair" to a majority of the Court to afford the protection. Later cases reaffirm that the process of "absorption" is one of extending "rights." See *Ker* v. *California*, 374 U. S. 23; *Malloy* v. *Hogan*, *supra*, and cases cited by MR. JUSTICE BRENNAN in his dissenting opinion in *Cohen* v. *Hurley*, *supra*, at 156. I agree with these decisions, as is apparent from my votes in *Gideon* v. *Wainwright*, 372 U. S. 335; *Malloy* v. *Hogan*, *supra*, and *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, and my concurring opinion in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 297, and I subscribe to the process by which fundamental guarantees of the Bill of Rights are absorbed by the Fourteenth Amendment and thereby applied to the States.

Furthermore, I do not agree with my Brother HARLAN that once a provision of the Bill of Rights has been held applicable to the States by the Fourteenth Amendment, it does not apply to the States in full strength. Such a view would have the Fourteenth Amendment apply to the States "only a watered-down subjective version of the individual guarantees of the Bill of Rights." *Malloy* v. *Hogan*, *supra*, at 10–11. It would allow the States greater latitude than the Federal Government to abridge concededly fundamental liberties protected by the Constitution. While I quite agree with Mr. Justice Brandeis

that "[i]t is one of the happy incidents of the federal system that a . ... state may . . . serve as a laboratory; and try novel social and economic experiments," *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights. My Brother HARLAN'S view would also require this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States.

Finally, I do not see that my Brother HARLAN'S view would further any legitimate interests of federalism. It would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction. This is well illustrated by the difficulties which were faced and were articulated by the state courts attempting to apply this Court's now discarded rule of *Betts* v. *Brady*, 316 U. S. 455. See Green, *supra*, at 897–898. These difficulties led the Attorneys General of 22 States to urge that this Court overrule *Betts* v. *Brady* and to apply fully the Sixth Amendment's guarantee of right to counsel to the States through the Fourteenth Amendment. See *Gideon* v. *Wainwright*, *supra*, at 336. And, to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

I adhere to and support the process of absorption by means of which the Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the Fourteenth Amendment. Although, as this case illustrates, there are differences among members of the Court as to the theory by which the Fourteenth Amendment protects the fundamental liberties of individual citizens, it is noteworthy that there is a large area of agreement both here, and in other cases, that certain basic rights are fundamental—not to be denied the individual by either the state or federal governments under the Constitution. See, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Gideon* v. *Wainwright*, *supra*; *New York Times Co.* v. *Sullivan*, *supra*; *Turner* v. *Louisiana*, 379 U. S. 466.